SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1965~~ 1966

No. ~~72~~ 73

ROBERT REDRUP, PETITIONER,

vs.

NEW YORK.

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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RECORD PRESS, PRINTERS, NEW YORK, N. Y., JUNE 21, 1966.

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[fol. 1]

IN THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK

FIRST JUDICIAL DEPARTMENT

Docket No. A 4765 1964

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

—against—

ROBERT REDBUP, Appellant.

STATEMENT UNDER RULE 5531

1. The index number was No. A 4765—1964.

2. The names of the parties are as given above. There has been no change. The People of the State of New York are represented by Hon. Frank S. Hogan, District Attorney of New York County; defendant is represented by Osmond K. Fraenkel.

3. The action was commenced in the Criminal Court of the City of New York, County of New York.

4. The action was commenced with the filing of a complaint on April 11, 1964. Defendant pleaded not guilty on April 11, 1964. An information was filed on April 29, 1964. Defendant pleaded not guilty on May 14, 1964.

[fol. 2] 5. The prosecution under Penal Law, Section 1141, subdivision (1), on a charge in connection with the sale of two books entitled "Lust Pool" and "Shame Agent" alleged to be obscene. The information contained two counts, one of which related to each of the books.

6. The appeal is from a judgment finding defendant guilty of both counts entered on June 11, 1964. Defendant received a suspended sentence on July 28, 1964.

7. The appendix method is not being used.

[fol. 3]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

PART 1 A, COUNTY OF NEW YORK

COMPLAINT—Filed April 11, 1964

State of New York,
County of New York, ss.:

Ptl Robert Griefenstein of No. P B MS, County of New York City of New York, being duly sworn deposes and says that on April 10 1964 at about 5 50 P. M., at 263 W 42 St newsstand
street level of subway arcade in the County of Ny State of New York, the defendant, Robert Redrup did commit the crime of:

1 Obscene Prints and Articles, in that said defendant unlawfully did sell, lend, give away, distribute, show and transmute, and offer to sell, lend, give away, distribute, show and transmute, and possess with intent to sell, lend, distribute, give away, show and transmute, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book, pamphlet, story paper, writing, paper, picture, drawing and photograph, and written, printed and recorded matter of an indecent character, having knowledge thereof, whereof a more particular description would be offensive to this court, and improper to be spread upon the records thereof, wherefor such description is not here given;

under the following circumstances: the deponent says that he did approach the above mentioned newsstand and spoke to the attendant at the stand and he did then purchase two paper back books. They were titled "Lust Pool" and this is a Pillar book and "Shame Agent" an Ember Book. The deponent paid the sum of $1.65 for the two said books and the defendant did accept the money. The deponent says that the books he purchased were of a lewd lascivious

indecent nature and he did then announce his authority to the defendant and seized six additional books titled "Lust pool". No other property was seized.

Ptl Robert Griefenstein

W. E. Ringel, Judge, Criminal Court of the City of New York.

Sworn to before me, April 11 1964

Vacation Aug 10 to Aug 22 1964

Adjourned to 4/28 Bail $

PART 1A

FRANK COURT, STR. COURT REPORTER

County of

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

APR 11 1964 WILLIAM E. RINGEL Judge.
Date

Adjourned to May 14 Bail $ DC

Part 2B.

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

APR 8 1964 NICHOLAS F. DEL GIUDICE
Date

Adjourned to Bail $

If paroled, the defendant was advised pursuant to section 1694b of the Penal Law.

Date Judge.

Upon arraignment and before accepting a plea, defendant was advised pursuant to Section 335b Code of Criminal Procedure as follows:

On this charge the law authorizes a different or additional punishment if you have previously been convicted of this or a similar offense. The fact that you have been previously convicted may be established after conviction or plea of guilty and if established you will be subject to a different or additional punishment.

Date Judge.

SENTENCE

Judge.

4

Week-end/Night Part Docket

Court Docket A 4765

13

CRIMINAL COURT OF THE CITY OF NEW YORK

Part 1 A County of NY

THE PEOPLE OF THE STATE OF NEW YORK

vs.

1. Robert Redrup m 36
11-41 F D R Drive
Address

2.

2525 Address

3. Address

ARNOLD WARSHAWSKY COURT REPORTER

Defendant arraigned 4 11 64 19

Hon. Judge.

Griefenstein 3732
Officer and Shield No.

PBS
Assignment.

The defendant, on being brought before me was informed of the within charge of violation of

Penal Law § 1141—Obscene Prints and Articles

of his right to communicate with relatives or friends by letter or telephone free of charge, of his right to the aid of counsel at every stage of the proceedings and before any further proceedings, of his right to an examination of the charge, of his right to an adjournment to procure counsel or to communicate with anyone and of his right to a trial in a part of the Court held by a panel of three judges.

FRANK COURT, STR. COURT REPORTER

APR 11 1964 WILLIAM E. RINGEL Judge.

Defendant pleads GUILTY

Date , 19

Judge.

Tried and found GUILTY

Date , 19

Judge.

Witnesses—name and address

Complaint prepared by Sgt Hagan

Exam. Waived ....., 19....

Exam. Begun ....., 19....

Exam. Closed ....., 19....

ORDER

There being no sufficient cause to believe the within-named

.....

.....

.....

guilty of the offense within mentioned, I order said defendant to be discharged.

Dated, ..., 19....

.....
Judge.

It appearing to me by the within depositions and statements that the crime therein mentioned has been committed, and that there is sufficient cause to believe the within named defendant

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guilty thereof, I order that said defendant be held to answer and be admitted to bail in the sum of

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and be committed to the Commissioner of Correction of the City of New York until he give such bail.

Dated, ..., 19....

.....
Judge.

CASH BAIL POSTED. Treas. Cert. #.....

ORDER THAT THE WITHIN CASH BAIL BE REFUNDED

.....
Date *Judge.*

.....
Refund Number *Court Clerk.*

[fol. 5]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

against

ROBERT REDRUP, Defendant.

INFORMATION—Filed April 29, 1964

Be it Remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-mentioned defendant of the Crime of Obscene Prints and Articles, committed as follows:

The said defendant, on April 10, 1964, in the County of New York, unlawfully did sell to one Robert Griefenstein, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book entitled "Lust Pool," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

Second Count

And I, the District Attorney Aforesaid, by this information, further accuse the said defendant of the Crime of Obscene Prints and Articles, committed as follows:

The said defendant, on April 10, 1964, in the County of New York, unlawfully did sell to one Robert Griefenstein, a certain obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting book entitled "Shame Agent," whereof a more particular description would be offensive to this court and improper to be spread upon the records thereof, wherefore such description is not here given.

Frank S. Hogan, District Attorney.

Witnesses

ROBERT GRIEFENSTEIN
PBMS

Cal. No. 2527 A 4765

CRIMINAL COURT OF THE
CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE

vs.

POLICE DEPT. RECORD ATTACHED

- ROBERT REDRUP B.

INFORMATION:
OBSCENE PRINTS.

FRANK S. HOGAN,
District Attorney.

Filed APR 23 1964

Counsel,

ADJOURNMENTS:

5/14 2 B

U. A. REL'D PAPERS

FOR

[fol. 6]

MAY 14 1964

T. VINCENT QUINN WALTER J. BAYER
MICHAEL CAGLIANO

JUN 1964

JOHN M. MURTAGH

VINCENT R. IMPELLITTERI THOMAS E. ROHAN
MICHAEL A. CASTALDI

Tried & dec. reserved for June 11, 64
V & P Impellitteri
June 4, 64 P.J.

JACOB KLEIN, COURT REPORTER

(1)

JUN 11 1964

JOHN M. MURTAGH

VINCENT R. IMPELLITTERI THOMAS E

MICHAEL A. C

Def. found guilty on Charges of Counts 1 of Investigation

Sentence July 28, 19

V & P Impellitteri

6-11-64

ON TRIAL, DEFENDANT CONVICT

6-11-64 F

INVESTIGATION AND SENTENCE

July 28

VINCENT R. IMPELLITTERI

JOHN GREEN, Court Reporter

DAVID D. GEDDES, COURT REPORTER

(11)

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[fol. 7]

JUL 28 1964 [redacted]

[redacted]

Leon. Spiegel. Whitman

JOHN GREEN, Court Reporter

[fol. 8]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

PART 2-B, NEW YORK COUNTY

Docket No. A-4765.

Charge: Vio. §1141 of the Penal Law

THE PEOPLE OF THE STATE OF NEW YORK

On Complaint of:

OFFICER ROBERT GREIFENSTEIN,

—versus—

ROBERT REDRUP, Defendant.

Transcript of Trial—June 4, 1964

Trial held at: 100 Centre Street, New York 13, N. Y.

Before: Hon. Vincent R. Impellitteri, Hon. Michael A. Castaldi, Hon. Thomas E. Rohan, Judges.

Bridgeman: Andrew Orensky.

APPEARANCES:

For the People:

Vincent Cuccia, Esq., Assistant District Attorney, New York County.

[fol. 9] For the Defendant:

Osmond K. Fraenkel, Esq., 120 Broadway, New York 5, N. Y.

Court Officer: Calendar No. 1, Docket A-4765, Robert Redrup. Defendant is charged with violation of §1141 of the Penal Law. Counsel, your name for the record, sir.

Mr. Fraenkel: Osmond K. Fraenkel, 120 Broadway.
Judge Impellitteri: Both sides ready?
Mr. Cuccia: Yes, People are ready.
Judge Impellitteri: Call your first witness.
Mr. Cuccia: Officer Greifenstein . . .

PATROLMAN ROBERT GREIFENSTEIN, Shield No. 3732, assigned to Patrol Borough Manhattan South, Police Department, City of New York, called as a witness in behalf of the People, being first duly sworn, by the Court, testified as follows:

Court Officer: Give your name, shield number and assignment.
The Witness: Patrolman Robert Greifenstein, Shield [fol. 10] 3732, Patrol Borough Manhattan South.

Direct examination.

By Mr. Cuccia:

Q. Officer, on April 10th, 1964 at about 5:50 P.M. were you in the vicinity of 263 West 42nd Street on the street level of the subway arcade of the City, County, and State of New York?
A. Yes, I was.
Q. And did you visit a newsstand in that location?
A. Yes, sir.
Q. Will you tell us what happened when you arrived at this newsstand?
A. Approximately 5:50 P.M. I approached the newsstand at 263 West 42nd Street, which is on the street level of the subway arcade. I approached the newsstand and saw displayed in a bookrack, two books, "Lust Pool", and "Shame Agent." I asked the clerk, the defendant, Robert Redrup—
Q. This individual sitting in Court today?
A. Yes, sir. I pointed to the bookrack and I said, "Lust Pool and Shame Agent."—

Judge Rohan: What is the name of those books?

The Witness: "Lust Pool" and "Shame Agent." The defendant removed the two books from the bookrack and placed them on the counter. I handed the defendant a [fol. 11] dollar bill. The defendant said, "That will be one dollar and eighty cents." ($1.80). I said, "I am sorry; I thought they were fifty cents each." Then the defendant said to me, "These cost more; they're ninety cents each." I gave the defendant another dollar bill, a second dollar bill, and the defendant gave me—excuse me—the defendant said that "These cost ninety cents each." I said to the defendant, "This one is marked seventy-five cents."—That was the copy of Shame Agent. He said, "Okay, give me a dollar sixty-five." I then handed him the second dollar bill and the defendant handed me thirty-five cents change. Then he placed the two books, "Lust Pool" and "Shame Agent" in a brown paper bag and handed it to me.

Q. Do you have the two books which the defendant handed you?

A. Yes, I do.

Q. Do you have also the paper bag?

A. Yes, sir.

Q. And are the books and paper bag in the same condition now as when you purchased them?

A. Yes, sir.

Mr. Cuccia: I offer all three as People's Exhibit 1, 2, [fol. 12] and 3—the paper bag as 3, "Shame Agent" 1, and "Lust Pool" 2.

Mr. Fraenkel: No objection.

[Paper Bag and 2 Books Received and Marked People's Exhibits Nos. 1, 2, 3, in Evidence, of This Date.]

Judge Impellitteri: You may proceed.

Q. After having made the purchase, Officer, did you identify yourself?

A. I identified myself as a Police Officer and I showed the defendant a search warrant I had for the premises.

Q. Did you have a conversation with him?

A. Yes, I had a conversation with the defendant.

Q. What did you say to him, and what did he say to you?

A. The defendant asked me what was wrong. I told him we had a search warrant for the premises, for certain materials they were selling in the premises. I then searched—

Q. Never mind. Did you have a conversation with him?

A. Yes.

Q. What was the conversation?

A. I asked the defendant who he worked for; he said that he worked for Milton Block. I asked him how long he [fol. 13] worked for Mr. Block; he said for approximately two years; he alternated between the newsstand where the arrest was made and the bookstore which was down the stairs in the subway itself. He stated that he made seventy-five ($75) dollars a week. I asked the defendant while we were in the newsstand, "Why do you sell this garbage?" The defendant stated, "There is worse stuff than that around;" he says, "I think these books here are worse," and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white.

Mr. Cuccia: All right. I have no further questions.

Cross examination.

By Mr. Fraenkel:

Q. Did you make a note of that conversation after the arrest?

A. I don't believe so.

Q. And you didn't refer to it in your complaint, did you?

A. No, I don't have that in my complaint.

Q. How many arrests do you make— You're assigned [fol. 14] to this field of so-called obscene books, are you not?

A. I am not assigned to it specifically, only when I receive a complaint.

Q. About how many arrests have you made since April in this area?

A. Since April 10th? I haven't made many for 1141 since April 10th.

Q. How many arrests have you made otherwise in that period?

A. For 1141 of the Penal Law?

Q. No—

Mr. Cuccia: Objection.

A. How many arrests have I made since?

Mr. Cuccia: —I withdraw the objection.

A. —Other type arrests?

Q. Yes.

A. Approximately 20.

Q. And you have conversations with everybody when you arrest them?

A. Yes.

Q. And you don't make notes of those conversations, you carry them all in your head?

A. No, I make notes.

Q. But you didn't make notes this time, did you, of this [fol. 15] particular conversation?

A. No.

Mr. Fraenkel: That's all.

Judge Impellitteri: You may step down.

Mr. Cuccia: That is the People's case.

Motion to Dismiss and Ruling Thereon

Mr. Fraenkel: Defendant moves to dismiss separately each count of the information, on the following grounds: First, that the People have failed to prove scienter, any knowledge of the contents of the book, either book, or that defendant had any reason to believe that the books came within the prohibition of the law. Second, on the ground that the People have failed to prove what constitute community standards, that the burden is on the People to offer such proof. Third, on the ground that neither book comes within the prohibition of the law, and, therefore, the People have failed to make out a *prima facie* case, and that to

permit a conviction under this information will constitute a violation of the Constitution of the State of New York, and of the due process clause of the Fourteenth Amendment of the United States Constitution.

[fol. 16] Judge Impellitteri: The Court will reserve decision on your motion.

Mr. Fraenkel: Will you take the stand?—

Robert Redrup, the Defendant, called as a witness in his own behalf, being first duly sworn, by the Court, testified as follows:

Court Officer: What is your name?
The Witness: Robert Redrup.
Court Officer: Where do you live?
The Witness: 11-41 F.D.R. Drive.
Court Officer: What is your business or occupation?
The Witness: Clerk, bookstore.

Direct examination.

By Mr. Fraenkel:

Q. Mr. Redrup, how long have you been employed at this place of business that is involved here?

A. I was working there that night for one hour.

Q. No, no, how long have you been employed by them?

A. Two years.

[fol. 17] Q. And what is your principal duty in connection with that employment?

A. Working downstairs in the bookstore.

Q. Will you describe that bookstore, please?

A. Well, it is down in the arcade of the IND subway, Eighth Avenue.

Q. And how large a store is it?

A. Oh, it is about 20 x 12.

Q. And what kind of books are on sale there?

A. All kinds of paperbacks.

Q. Fiction, poetry?

A. Fiction, nonfiction, historical, philosophical.

Judge Impellitteri: Will you keep up your voice? We have to hear you.

The Witness: Historical, philosophical, mythology, popular novels, mysteries, western.

Q. Now, is there a newsstand connected with that bookstore under the same ownership?

A. Yes.

Q. And where is that located?

A. Up on the street level, at 263 West 42nd Street.

Q. Now, how much of your time is spent at that news-

[fol. 18] stand?

A. None at all now.

Q. But at that period?

A. One hour, 5:30 to 6:30.

Q. Each day, or just certain days a week?

A. No, it was just in that period because a man was sick, I had to go up there from 5:30 to 6:30 when the other man came in, and it was just on Fridays, and it only had been for that week and not the week before, but two weeks before that.

Q. In other words you had been there for about an hour on two earlier occasions besides this one on which you were arrested, is that right?

A. One earlier occasion.

Q. One earlier occasion. When the Police Officer identified himself, what was your conversation with him?

A. I asked him what was wrong.

Q. And what did he say?

A. He said he had a search warrant, showed it to me, wanted to search, and he came in behind the counter and he started to look— Oh, first he asked me for the books, and then I asked the other man if he had them in the place— his name is John.

[fol. 19] Q. There was another clerk there at the same time?

A. Yes, there was, and he said he would look, and he looked. He got them down and he handed them to me. He asked me how much—

Q. Speak up, please.

A. He asked me how much; I told him "One dollar and eighty cents," and then there was a question of a price because one was marked "75" on the binding, and I asked John about it and he said, "Charge what it says." I told him, "All right, a dollar sixty-five." ($1.65). He paid me, and I gave him his change.

Q. Did he ask you anything about how long you have been employed there?

A. After, yes.

Q. Tell us about that conversation.

A. I told him I was only up here for an hour on Friday nights, and it was only for this particular period because a man was sick, that he couldn't be there, so I filled in for that hour.

Q. You heard the Officer testify that you had said there were worse books than these there; was anything like that said?

A. I don't recollect anything like that going between us [fol. 20] in conversation.

Q. Was anything said by you with reference to certain girlie magazines that were on the counter?

A. No.

Q. Are you married?

A. Yes.

Q. Children?

A. One child.

Q. One child. Have you ever been convicted of anything before?

A. No.

Q. Or even arrested before?

A. No.

Q. Have you ever seen these, either of these books before that time?

A. No, I didn't.

Cross examination.

By Mr. Cuccia:

Q. Mr. Redrup, how old are you?

A. Thirty-six.

Q. And you have been working for your present employer [fol. 21] for about two years, is that correct?

A. That is correct.

Q. And you say you were primarily in a bookstore downstairs?

A. I have been in the bookstore for the last eight months since it has been opened.

Q. And on how many occasions have you worked at the newsstand where you were arrested?

A. Previous?

Q. Previously to the time you were arrested?

A. For the remaining period of the two years—sixteen months.

Judge Impellitteri: Will you keep up your voice?

The Witness: Sixteen months; the remaining of the two years I worked upstairs at the newsstand.

Q. That's where you were arrested, is that right?

A. Yes.

Q. Your salary is seventy-five ($75) dollars a week?

A. Yes, it is.

Q. Did you tell the Officer it was seventy-five ($75) dollars a week?

[fol. 22] A. Yes, I did.

Q. You say another man was sick and that's why you were helping out in the newsstand?

A. That is correct.

Q. What is his name?

A. Tom Leonard.

Q. And how long had he been sick?

A. He was working, but he couldn't work at the newsstand; in other words, he had a rupture and he couldn't

work up there in this period because he couldn't lift heavy newspaper bundles.

Q. Between 5:30 and 6:30?

A. No, he was working downstairs.

Q. He couldn't work at the newsstand between 5:30 and 6:30?

A. Right.

Q. So he went down to the bookstore?

A. He couldn't work at the newsstand at all, so because of our schedule the way it was, the man who was going to take his place at the newsstand came in at 6:30, so what he did was he came in 5:30, relieved me at the bookstore that Friday night. I went up from 5:30 to 6:30 until the other man came. And the other man came, incidentally, [fol. 23] while the Police Officers were there.

Q. Is Mr. Leonard here in Court today?

A. No, he isn't.

Q. You say there was another gentleman named John who was in the newsstand with you?

A. Yes, right.

Q. Was he working there also?

A. Yes.

Q. Do two men usually handle that newsstand?

A. At that time, yes.

Q. And was he also selling magazines and newspapers and what-not?

A. He was selling—he was over on the side where magazines were, and I was at the cash box selling whatever people bought, newspapers predominantly.

Q. You say when the Police Officer asked by name for the two books, you in turn questioned John?

A. That's right.

Q. And did he show you where the two books were?

A. He went and got them.

Q. He got them?

A. That's right.

Q. And he handed them to you?

[fol. 24] A. I believe so, yes.

Q. Well, did he hand them to the Police Officer directly, or did he hand them to you?

A. I am not positive on that point whether he handed them to me or the Police Officer.

Q. Is it possible he put them on the stand himself, on the counter?

A. It is possible, yes.

Q. And then he went back to his original post on the other side of the stand?

A. Well, it is one stand, yes, right there.

Q. And you said "One dollar and eighty cents," right?

A. Yes.

Q. How did you arrive at the figure $1.80?

A. Because they charge 90 cents apiece for those books.

Q. Didn't you look at the covers?

A. Not usually, no.

Q. Did you look at the covers in this case?

A. No, not until after there was some question.

Q. You just said "$1.80"—

A. Yes.

[fol. 25] Q. —off the top of your hat?

A. Yes, because there is a sign, ninety cents apiece.

Q. Look at People's Exhibit 2, "Lust Pool," tell me if there is a figure on that?

A. No, no figure.

Q. No figure at all?

A. No, not there.

Q. And look at "Shame Agent" and tell me what figure is on that?

A. "Seventy-five cents."

Q. "Seventy-five cents." And you charged $1.80?

A. No.

Q. You asked $1.80 originally?

A. Originally, yes, I asked $1.80.

Q. Then you turned to John, is that right?

A. Right, and I asked him, "What about this?"—it wasn't crossed off, and he said, "Charge what it says," and I told the Officer then, "$1.65."

Q. Was John present when the arrest was made?
A. Yes, he was.
Q. Did the Police Officer arrest him?
A. No, he did not.
[fol. 26] Q. Did he say anything to John?
A. He said he is going to take one of us in.
Q. John said that?
A. No, no.
Q. The Police Officer said that?
A. Yes.
Q. What type literature is sold in the newsstand where you worked that particular day where you were arrested?
A. Magazines, papers, pocketbooks.
Q. Were any girlie magazines on the counter?
A. Girlie magazines, yes.
Q. There were?
A. Yes.
Q. And tell me, do you sell philosophical works in that newsstand?
A. They don't handle that type pocketbook.
Q. Do you handle historical novels?
A. No.
Q. Primarily detective stories, isn't that right, westerns, and books of this type, isn't that what you sell in that newsstand?
A. They sell Time Magazine, Life, the usual magazines that newsstands sell, Sport magazines, Racing magazines.
[fol. 27] Q. But you also knew that books along the style of "Lust Pool" were sold in that stand, didn't you, when you took over?
A. I knew those books were sold there; I could see them.
Q. Generally, you knew what was sold in that newsstand, the type literature?
A. No.
Q. Well, you knew philosophical works weren't sold in that newsstand?
A. Of course.

Q. Did you sell any books by Rousseau at that newsstand?

A. No.

Q. Do you sell any books by Descartes at that newsstand?

A. Not familiar with the title.

Q. Do you sell any books by Winston Churchill in that newsstand?

A. Not unless they're in magazine articles.

Q. I am talking about pocketbooks?

A. No.

Q. When immediately before the day of the arrest had [fol. 28] you been there in that newsstand selling?

A. When before?

Q. Yes?

A. Two weeks before on a Friday afternoon.

Q. You worked for an hour then?

A. That's right.

Q. And before that when was the last time?

A. About eight months.

Q. Eight months. Prior to that?

A. About last August, I think, or July. I may have filled in one Sunday, I'm not sure, I can't remember.

Q. Tell me, is John here today?

A. No, he isn't.

Q. Have you spoken to your employer Mr. Block about this case?

A. He knows about it, yes.

Q. Have you spoken about it—did you tell him you were arrested?

A. Sure, definitely.

Q. And did you tell him that you had only been working there one hour from 5:30 to 6:30, did you tell him that?

A. He knew that.

Mr. Fraenkel: I object to that. What difference does it [fol. 29] make whether he told his employer about it?

Judge Impellitteri: Objection sustained. Any further questions?

Mr. Cuccia: I have nothing else.

Mr. Fraenkel: Step down. Defendant rests.

Judge Impellitteri: People?

Mr. Cuccia: People rest.

Judge Impellitteri: Motion.

MOTION TO DISMISS, ETC. AND RULING THEREON

Mr. Fraenkel: Defendant renews the motion previously made, and moves for judgment of acquittal on the ground the People have failed to prove the defendant's guilt beyond a reasonable doubt.

Judge Impellitteri: Court will reserve decision, and set this case down for decision for the 10th—

Mr. Fraenkel: Could it be the 11th rather than the 10th?

Judge Impellitteri: Yes, reserve decision, set down for June 11th, 10:00 A.M.— May I have the papers, please?

Patrolman Greifenstein: Your Honor, will it be necessary for me to be here that day?

[fol. 30] Judge Impellitteri: No.

Patrolman Greifenstein: Thank you, sir.— I have additional copies—

Judge Impellitteri: Then let's have two additional sets.

Patrolman Greifenstein: I have one more copy of "Shame Agent," and 7 copies of "Lust Pool," Your Honor.

Judge Impellitteri: Let's have whatever you have got.

Court Officer: Judge Castaldi has the books in evidence.

[fol. 32]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

BOROUGH OF MANHATTAN, PART 2B

Docket No. A 4765

Charge: 1141 Penal Law

[Title omitted]

VERDICT—June 11, 1964

Before: The Honorable, Vincent Impelliteri, Presiding, Thomas E. Rohan and Michael Castaldi, Justices, Criminal Court.

[fol. 33] Bridgeman: Docket No. A 4765, Robert Redup, charged with 1141 of the Penal Law. Defendant is represented by Osmond K. Frankel, 120 Broadway, New York. Case is on for decision.

Presiding Judge: During the time since the conclusion of this case the court has reached a decision in this matter. The court has read the two books involved in this case and the motion to dismiss is denied as to each count of the information and the defendant is found guilty as charged of both counts of the information. The case will be put down for investigation and sentence. June 28. Is the defendant out on bail?

Court Officer: Yes.

Presiding Judge: Bail is continued.

(Whereupon the within matter was adjourned for sentence to June 28, 1964.)

[fol. 35]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK: PART 2B

Docket No. A 4765

[Title omitted]

SENTENCE—July 28, 1964

Before: The Honorable Judges, Reuben Levy, Presiding, Spiegel and Whitman.

[fol. 36] Bridgeman: A 4768, Robert Redrup, charged with Obscent Prints. Defendant is represented by Osmond Fraenkel, 120 Broadway, New York, New York.

Presiding Judge: Is this Robert Redup before us?

Defendant's Counsel: Yes, that is right.

Presiding Judge: Is there any legal cause why sentence should not be pronounced?

Defense Counsel: Nothing. He was convicted of the section dealing with obscene prints—

Presiding Judge: He had no prior record according to the yellow sheet. Is there anything that you want to say before sentence is pronounced?

Defense Counsel: I want to call the court's attention to the fact that not only has he no prior record but he is married for about six years; he lives with his wife and child. He is employed. It is an accident more or less that he happened to be in charge of the place at the time that this [fol. 37] occurred. I therefore ask the court to be as lenient as possible aside from the fact, of course, that we contend that the conviction was not justifiable as a matter of law.

Presiding Judge: We have the probation report before us and it is recommended that he should have a suspended sentence so that is the sentence.

Defense Counsel: Thank you, sir.

(Whereupon the within matter was concluded.)

[fol. 38]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

COUNTY OF NEW YORK

Docket #A 4765

[Title omitted]

NOTICE OF APPEAL—July 30, 1964

Please Take Notice that defendant hereby appeals to the Appellate Term of the Supreme Court, for the First Judicial Department, from a judgment of conviction for violation of Section 1141 of the Penal Law rendered July 28, 1964, pursuant to which defendant received a suspended sentence.

Dated: July 30, 1964

Osmond K. Fraenkel, Attorney for Defendant, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

To:

Clerk of the Criminal Court, County of New York.

Hon. Frank S. Hogan, District Attorney of New York County, 155 Leonard Street, New York 13, N. Y.

[fol. 39]

AFFIDAVIT OF NO OPINION

State of New York,
County of New York, ss.:

Osmond K. Fraenkel, being duly sworn, deposes and says:

I am the attorney for the above named appellant. No opinion was rendered by the Criminal Court of the City

of New York, County of New York, other than the statement appearing on the minutes of the hearing of July 28, 1964.

Osmond K. Fraenkel

Sworn to before me this 25th day of September, 1964.

Edward J. Walsh, Jr., Notary Public, State of New York, No. 30-9517275, Qual. in Nassau Co., Certificate filed in New York County, Commission Expires March 30, 1966.

[fol. 40] Certification by Attorney (omitted in printing).

[fol. 41]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK

ORDER SETTLING CASE—October 13, 1964

The foregoing case on appeal, containing all the evidence, is hereby settled and ordered on file.

Dated: October 13, 1964.

Larry M. Vetrano, Judge, Criminal Court of the City of New York.

[fol. 42]

IN THE CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff,

—against—

ROBERT REDRUP, Defendant.

STIPULATION RE EXHIBITS—October 13, 1964

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the exhibits

herein, People's Exhibits 1, 2 & 3, need not be part of the record and that the originals thereof may be submitted on the calendar call of this case.

Dated: October 13, 1964.

Frank S. Hogan, District Attorney, New York County, By: Milton M. Stein, Attorney for Plaintiff.

Osmond K. Fraenkel, Attorney for Defendant.

[fol. 43] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 44]

IN THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Present: Hon. Samuel M. Gold, J.P., Hon. Louis J. Capozzoli, Hon. Samuel H. Hofstadter, Justices.

No. #585

THE PEOPLE OF THE STATE OF NEW YORK, Respondent.

vs.

ROBERT REDRUP, Defendant-Appellant.

JUDGMENT—December 17, 1964

An appeal having been taken to this Court by Robert Redrup, the defendant-appellant, from a judgment of conviction by Hons. Impellitteri, Castaldi, Rohan, Judges of the New York City Criminal Court, upon the charge of Violation of §1141 of the Penal Law, entered on the 11th day of June, 1964, and said defendant-appellant having been sentenced by Hons. Levy, Spiegel, Whitman, Judges of said Court on the 28th day of July, 1964, as follows:

Suspended sentence

and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter

Samuel M. Gold, Justice, Appellate Term, Supreme Court, First Department.

[fol. 45]

In the Court of Appeals of New York

Before: Hon. Stanley H. Fuld, Associate Judge.

The People of the State of New York, Respondent,

against

Robert Redrup, Defendant-Appellant.

Certificate Denying Leave to Appeal—January 4, 1965

I, Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Albany, New York
January 4, 1965.

Stanley H. Fuld
Associate Judge

[fol. 46]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1964

ROBERT REDKUP, Petitioner,

vs.

NEW YORK.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—March 25, 1965

Upon Consideration of the application of counsel for petitioner(/s/),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including April 19th, 1965.

J. M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of March, 1965.

(Handwritten notation)

I have shortened the extension requested by one week in order to ensure that action on the petition for certiorari may be had at this Term.

J. M. H.

[fol. 47]

SUPREME COURT OF THE UNITED STATES

No. 72—October Term, 1965

ROBERT REDRUP, Petitioner,

v.

NEW YORK.

ORDER ALLOWING CERTIORARI—April 25, 1966

The petition herein for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York, First Judicial Department is granted, limited to Question 4 presented by the petition which reads as follows:

"4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Stewart are of the opinion that certiorari should be granted on all the questions presented by the petition.

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Supreme Court of the United States

October Term, [redacted]
No. [redacted] 1966

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department.

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IN THE

Supreme Court of the United States

October Term, 1964
No. .....

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department.

Petitioner, Robert Redrup, prays that a writ of certiorari issue to review the judgment of the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, entered in the above entitled case on December 17, 1964.

Opinions Below.

The action was tried in the Criminal Court of the City of New York, County of New York. No opinion was delivered by the three-judge court before whom the action was tried, except the statements at the conclusion of the trial finding petitioner guilty as charged [R. 33] and suspending sentence [R. 37].[1]

[1]The page references are to the Record on Appeal filed in the court below, and included in the transcript of the record prepared and certified by the clerk of the court below.

The judgment of conviction was affirmed by the Appellate Term of the Supreme Court for the First Judicial Department. No opinion was delivered by the said court.

Application for leave to appeal to the Court of Appeals of New York was denied without opinion.

Jurisdiction.

The judgment of the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department was entered on December 17, 1964. The said judgment is printed as Appendix A hereto. A timely application for leave to appeal to the Court of Appeals of New York was denied on January 4, 1965. By order of Mr. Justice Harlan dated March 25, 1965, the time to file this petition for a writ of certiorari was extended to and including April 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257-(3).

Questions Presented.

1. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, an accused in a State obscenity prosecution, as the petitioner herein, can be convicted without any proof in the record that the books involved exceed the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity.

2. Whether, in the light of the requirements of due process of law under the Fourteenth Amendment and the constitutional standards for judging obscenity enun-

ciated by the Supreme Court, the State's failure to bear the burden of proving in the obscenity prosecution herein that the writings involved exceed the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity, invalidates the judgment of conviction rendered against petitioner.

3. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a State may regard the trier of fact in a local obscenity prosecution as the embodiment of national community standards, competent to judge a challenged writing against those standards, without any evidence in the record, as in the case herein, to establish that the writing exceeds contemporary community standards, or appeals to prurient interest or is utterly without social importance.

4. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

5. Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, the books involved in the prosecution herein upon which a judgment of conviction was rendered are entitled to constitutional protection.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and New York Penal Law, Section 1141, subdivision (1), are printed as Appendix B hereto.

Statement of the Case.

(a) By Information filed April 29, 1964 [R. 5] in the Criminal Court of the City of New York of the County of New York, petitioner was charged in two counts with violations of New York Penal Law, Section 1141, subdivision (1). The first count charged that petitioner, on April 10, 1964, did sell to one Greifenstein, a certain "obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic and disgusting" book entitled *Lust Pool* [R. 5]. In similar language, the second count charged the sale of a book entitled *Shame Agent* to the same named person on the same aforesaid date [R. 5]. The cause came on for trial before a three-judge court in the Criminal Court of the City of New York for New York County on June 4, 1964 [R. 8].

(b) At the trial, the two books were offered into evidence by the prosecutor, without objection [R. 11-12]. No evidence was offered by the prosecution with respect to the alleged obscenity of the writings.

(c) The only evidence offered at the trial by the prosecution and petitioner was with respect to the issue of *scienter*. For the prosecution, a police officer, Greifenstein [R. 9], testified that he saw the two books displayed in a bookrack at a newsstand on 42nd Street in New York City, and asked "the clerk" [R. 10], petitioner herein, for the writings. Petitioner

removed the two books from the bookrack; placed them on the counter; the police officer paid the purchase price; the petitioner placed the two books in a bag and handed it to the officer [R. 10-11].

The officer asked petitioner whom he worked for [R. 12]. The petitioner replied that he had been in the employ of a Mr. Block for some two years. He earned seventy-five dollars ($75.00) a week [R. 13]. The officer asked petitioner: "Why do you sell this garbage?" [R. 13]. The petitioner replied: "There is worse stuff than that around", and stated, "I think these books here are worse", referring, stated Officer Greifenstein, to "girlie magazines that were on top of the counter with the nudes and seminudes in color and black-and-white" [R. 13].

The petitioner testified that his principal duty was working in the bookstore in the arcade of the subway where paperbacks covering a wide variety of literary, scientific and popular subjects were sold [R. 17]. Another man was ordinarily assigned to the newsstand but the man had been ill and petitioner had filled in for him for an hour until the arrival of another employee [R. 18]. Petitioner told the officer that he was up at the newsstand for only an hour because of the illness of the other employee for whom he was filling in [R. 19]. Petitioner had never seen the two books here involved before the officer asked for them [R. 20].

How Federal Questions Are Presented.

(d) At the trial, counsel for petitioner moved to dismiss each count of the Information, both at the end of the prosecution's case [R. 15-16] and at the end of the trial [R. 29], on the following grounds: "First,

that the People have failed to prove scienter, any knowledge of the contents of the book, either book, or that defendant had any reason to believe that the books came within the prohibition of the law. Second, on the ground that the People have failed to prove what constitute community standards, that the burden is on the People to offer such proof. Third, on the ground that neither book comes within the prohibition of the law, and therefore, the People have failed to make out a *prima facie* case, and that to permit a conviction under this information will constitute a violation of the Constitution of the State of New York, and of the due process clause of the Fourteenth Amendment to the United States Constitution" [R. 15].

At the conclusion of the trial, decision was reserved [R. 29-30]. On June 11, 1964, the court announced it had reached a decision: "The court has read the two books involved in the case and the motion to dismiss is denied as to each count of the information and the defendant is found guilty as charged of both counts of the information" [R. 33]. On July 28, 1964, petitioner received a suspended sentence [R. 36-37].

On appeal to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department [R. 3], the same federal questions as aforestated were briefed and argued before the court which affirmed the conviction, without opinion.

The same federal questions were also briefed and argued in support of the application for leave to appeal to the Court of Appeals of the State of New York. The said application was denied, without opinion, on January 4, 1965.

Reasons for Granting the Writ.

1. An essential part of a procedure, it is submitted, which purports to convict a person for the sale of alleged "obscene prints and articles" [R. 5] in violation of a state criminal statute (Penal Law 1141, subd. 1) is that all of the elements of the crime charged shall be proved beyond a reasonable doubt.

It is not only a fundamental principle of the common law that one accused in a criminal case is presumed to be innocent of the crime charged until he has been proved to be guilty beyond a reasonable doubt; due process of law in any case includes this presumption of innocence and imposes upon the prosecution the burden of proving the existence of every element necessary to constitute the crime charged.

A state criminal procedure, it has frequently been decided, may not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution Thus, "due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt", and "where the transcendent value of speech is involved", due process certainly requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall,* 357 U.S. 513, 526. See also, *Tot v. United States,* 319 U.S. 463, 469, 473; *Thompson v. City of Louisville,* 362 U.S. 199, 206, and cases cited in n.13; *Garner v. Louisiana,* 368 U.S. 157, 173-174, 175-176; *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 271, 277-280, 283-288; *Gar-*

rison v. Louisiana, 379 U.S. 64, 74-75; *Freedman v. Maryland*, 85 S. Ct. 734, 738-739.[2]

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected writings may be suppressed, and individuals involved in their circulation punished, under unproved charges. The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Rights guaranteed by the First and Fourteenth Amendments cannot be protected where a criminal trial is drained of the basic elements of a fair trial, where "the whole proceeding is a mask". *Moore v. Dempsey*, 261 U.S. 86, 91. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge v. Oregon*, 299 U.S. 353, 362; *Cole v. Arkansas*, 333 U.S. 196, 201; *Thompson v. City of Louisville*, 362 U.S. 199, 206.

In *Alberts v. California (Roth v. United States)*, 354 U.S. 476, this Court held that the safeguards necessary for securing the freedoms of speech and press for material not obscene required the following standard for judging the obscenity of a writing — whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. The aforesaid

---

[2] *Cf., Smith v. California*, 361 U.S. 147, 150-151; *Marcus v. Search Warrants of Property etc.*, 367 U.S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Gideon v. Wainwright*, 372 U.S. 335, 342-345; *Mapp v. Ohio*, 367 U.S. 643, 656-657; *Malloy v. Hogan*, 378 U.S. 1, 6-8; *Morgan v. United States*, 298 U.S. 468, 477-481; 304 U.S. 1, 18-19; *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86.

standard, in substitution for the *Hicklin* test, was deemed adequate to withstand the charge of constitutional infirmity. 354 U.S. at 489.

The Court's opinion in *Roth-Alberts* further indicated that the newly formulated standard for judging obscenity was similar to the definition of obscenity formulated by the American Law Institute, to wit: "A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, *i.e.*, a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters." 354 U.S. 487, n.20.

Roth-Alberts would appear, therefore, to have made plain that one essential element of the crime of obscenity, in both State and Federal jurisdictions, is the extent to which the writing in question substantially exceeds contemporary community standards, *i.e.*, the limits of candor in depiction or representation of sex, nudity or excretion. Indeed, in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, it was noted that the proposed Official Draft of the American Law Institute defined obscenity as material which, if " 'considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters' ". 370 U.S. at 486. Mr. Justice Harlan stated: "Obscenity under the federal statute thus *requires proof of two distinct elements:* (1) patent offensiveness; and (2) 'prurient interest' appeal" 370 U.S. at 486 (emphasis supplied).

Jacobellis v. Ohio, 378 U.S. 184, also involved a state court judgment of conviction after trial before a

three-judge court. In that case, witnesses testified for the prosecution and for the accused on the issue of obscenity, and the judgment of conviction of the state court was "based upon the testimony of numerous witnesses, the viewing of the film and all the evidence". *State v. Jacobellis*, 115 Ohio App. 226, 229, 175 N.E. 2d 123, 124 (1961). The highest state court upheld the judgment of conviction rendered by the "three judges sitting as the trier of the facts" (173 Ohio St.22, 28, 179 N.E. 2d 777, 781). This Court reversed, holding that the film involved was not obscene and hence entitled to the protection for free expression guaranteed by the First and Fourteenth Amendments. 378 U.S. at 186-187.

While members of the Court differed in *Jacobellis* as to whether the limits of candor with respect to the depiction or representation of sex were to be determined at any given time by the limits existent in the particular local community or in the Nation as a whole, no member of the Court appears to have doubted, it is submitted, that "contemporary community standards" is an element of the offense of obscenity, to be charged and proved. Mr. Justice Brennan stated: "It should also be recognized that the *Roth* standard requires in the first instance *a finding* that the material 'goes substantially beyond customary limits of candor in description or representation of such matters' ". 378 U.S. at 191 (emphasis supplied). Mr. Justice Brennan also added that the Court's conclusion as to the non-obscenity of the film in *Jacobellis* was based not only on a view of the material, but "in the light of the record made in the trial court" (378 U.S. at 196). Mr. Chief Justice Warren, dissenting, argued that the Court should limit

itself to a consideration only "of whether there is *sufficient evidence in the record* upon which a finding of obscenity could be made. *If there is no evidence in the record upon which such finding could be made, obviously the material involved cannot be held obscene.*" 378 U.S. at 202 (emphasis supplied).

In *Freedman v. Maryland*, 85 S. Ct. 734, the administration of a censorship system for motion pictures was alone involved, but the decision in the case has relevance here, it is submitted. The Court noted in *Freedman* that "unlike a prosecution for obscenity, a censorship proceeding puts the initial burden on the exhibitor or distributor". 85 S. Ct. at 738. It was pointed out that the Maryland procedural scheme required the exhibitor to "assume the burden of instituting judicial proceedings and of persuading the courts that the film is protected expression." 85 S. Ct., at 739. This Court held that the state censorship system failed to satisfy constitutional requirements. "First, the burden of proving that the film is unprotected expression must rest on the censor." 85 S. Ct. at 739. Adverting to the decision in *Speiser v. Randall*, the Court, in *Freedman*, stated again that due process requires that the State bear the burden of persuasion to show that the appellants engaged "in criminal speech". 85 S. Ct. at 739.

A review of the decided cases, therefore, appears to make plain that the burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole rests upon the prosecution as a requirement of due process. Without such evidence in the record, it is obvious that no finding can be made that the material "goes substantially beyond customary limits of candor

in description or representation of such matters". *Jacobellis v. Ohio,* 378 U.S. 184, 191.

In the case herein, there is absolutely no evidence in the record to support the conclusion that the two books involved substantially exceed the limits of candor in the Nation as a whole. Nor is there any mystery as to what occurred at the trial level: The prosecutor handed the books to the court; the court read the books; the court found the books "obscene". The State has suppressed two writings; and placed the stigma of criminality upon the seller of the writings, without proof that the books are outside the area of constitutional protection for freedom of expression.

If a return to *Hicklin,* with courts and juries acting as censors of material personally distasteful to them, is to be avoided, proof that material substantially exceeds the limits of candor in the Nation as a whole should be required in every obscenity prosecution, it is submitted. A state procedure which purports to dispense with such requirement in obscenity prosecutions ultimately results in the imposition of unconstitutional limitations on the public's access to constitutionally protected matter. *Speiser v. Randall,* 357 U.S. 513, 525; *Smith v. California,* 361 U.S. 147, 152-153; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717, 730-731; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66; *A Quantity of Copies of Books v. Kansas,* 378 U.S. 205, 211-212.

To place a book dealing with sex into evidence is hardly a step forward in support of an information charging the unlawful sale of an "obscene" writing. Sex is not obscenity, as this Court has repeatedly em-

phasized from *Roth-Alberts* to *Jacobellis*. See also, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Tralins v. Gerstein*, 378 U.S. 56. The sale of a book dealing with sex for like reasons imports no criminality.

The writings themselves plainly give no information as to what are the limits of candor in the Nation as a whole. Yet the trier of the fact in the state court, by its denial of the motion to dismiss the Information, and its finding of guilt, appears to have "presumed" that the writings substantially exceed the limits of candor in the Nation as a whole without any requirement of evidence to support such conclusion.

The power of the State to improvise presumptions in substitution for proof is limited by the due process provisions of the Constitution. *Tot v. United States*, 319 U.S. 463; *Manley v. Georgia*, 279 U.S. 1; *Bailey v. Alabama*, 219 U.S. 219; *Estern & Atl. R. Co. v. Henderson*, 279 U.S. 639. ". . . the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Tot v. United States, supra*, at 469.

Especially do the due process provisions place limitations upon the State's power to presume guilt when First Amendment liberties are involved. The state criminal procedures by which books are suppressed and punishment imposed for their circulation are as important as the validity of the substantive law applied. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally

protected rights — rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall*, 357 U.S. 513, 521. In *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, it was emphasized that interpretations of the First Amendment guarantees have constantly refused to recognize an exception for any test of truth, "and especially one that puts the burden of proving truth on the speaker". 376 U.S. at 271. This Court held further that the rule requiring proof of actual malice is not satisfied by "presuming" malice from proof of general damages, for "the showing of malice required for the forfeiture of the privilege is not presumed but is a matter of proof by the plaintiff". 376 U.S. at 284. See also, *Garrison v. Louisiana*, 85 S. Ct. 209; *Henry v. Pearson; Henry v. Collins*, Oct. Term, 1964, Nos. 89, 90, decided March 29, 1965. 33 United States Law Week 3319.

To permit triers of fact in obscenity prosecutions to presume or infer from the mere reading of a writing dealing with sex that such writing substantially exceeds the limits of candor in the Nation as a whole in the depiction or representation of sex or nudity is to open the door wide to the suppression of material which is not obscene. Such a procedure encourages reliance upon the hit-or-miss subjective reactions of the trier of facts to material which the trier finds distasteful, and a writing which the trier of the facts finds particularly distasteful to himself will inevitably lead the trier to presume that the writing exceeds nationwide limits of candor. Yet, as case after case reveals, it is when the trier of facts is most certain that a writing exceeds contemporary community standards that the trier is

most often wrong. *Times Film Corp. v. City of Chicago*, 355 U.S. 35, reversing 244 F. 2d 432 (7 Cir. 1957); *One, Inc. v. Olesen*, 355 U.S. 371, reversing 241 F. 2d 772 (9 Cir. 1957); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, reversing 128 F. Supp. 564 (D.C. D.C. 1955), 249 F. 2d 114 (D.C. Cir. 1957); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, reversing 289 F. 2d 455 (D.C. Cir. 1961); *Jacobellis v. Ohio*, 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E. 2d 777; *Tralins v. Gerstein*, 378 U.S. 576, reversing 151 So. 2d 19 (Fla., 1963); *Grove Press, Inc. v. Gerstein*, 378 U.S. 777, reversing 156 So. 2d 537 (1963). See also, *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488; *Zeitlin v. Arnebergh*, 59 Cal. 2d 901, 383 P. 2d 152, 31 Cal. Rptr. 800; *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965); *Larkin v. G.P. Putnam's Sons*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760. Protection for non-obscene writings can only be assured if the burden is placed upon the prosecution to prove by sufficient evidence that the limits of candor have been exceeded in particular cases. *Cf., Weiman v. Updegraff*, 344 U.S. 183, 191.

Nor are the limits of candor in the Nation as a whole at a given time a matter of "judicial notice". There can be no assumption in reason that any particular trier of facts in a particular local community knows, without evidence, what is the customary freedom of expression in the Nation as a whole with respect to sex and sex relations in the various media of communication, such as books, magazines, the motion pictures, the theatre, television, and in such fields of exploration as literature, art, science, physiology, psychol-

ogy and other related areas. The limits of candor in the United States with respect to the depiction and representation of sex and nudity are not a matter of common and general knowledge, well established and authoritatively settled. So long as the belief existed that local standards were the criterion there may have been some argument for the position that the trial judge might take judicial notice of the standards of his own community. But now that this Court has held, in *Jacobellis, supra,* that it is national standards that must govern, it would be irrational to suppose that judges in the inferior criminal courts all over the country possess the background or knowledge sufficient for an informed judgment on the subject.

The power of "judicial notice" is, as to matters involving First Amendment protections, one to be used with great caution, and if there is the slightest doubt as to the facts or common knowledge of the facts, evidence should be required. "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner v. Louisiana,* 368 U.S. 157, 173. The basis for appellate review and constitutional judgment is undermined "where the evidence is unknown". *Id.,* at 173.

There is no undue hardship placed upon the prosecution in requiring the State to prove the limits of candor and the extent to which the writing in question exceeds such limits. Prosecutors have successfully assumed the burden at the trial level in a number of obscenity prosecutions. *State v. Jacobellis,* 115 Ohio

App. 226, 175 N.E. 2d 123 (1961); aff'd. 173 Ohio St. 22, 179 N.E. 2d 777, rev'd. 378 U.S. 184; *People v. Smith (Smith v. California)*, App. Dept. Calif. Superior Court, No. CR A-5113, affirming judgment of conviction after jury trial and expert testimony offered on behalf of prosecution involving sale of *Tropic of Cancer*, cert. granted 373 U.S. 901, judgment vacated and case remanded to state court, 375 U.S. 259.

It may be that the limits of candor in the Nation with respect to the depiction and representation of sex and nudity cannot be delineated with the precision of a blueprint, but within reasonable bounds evidence of such limits at any given time can be adduced through expert testimony and other proof. *Cf., Smith v. California*, 361 U.S. 147, 163-167, 171-172; *Yudkin v. State*, 229 Md. 223, 182 A. 2d 798 (1962); A.L.I., *Model Penal Code* (Tent. Draft No. 6, 1957) 1-2, 44-45; Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 595-599 (1960).

If concepts of "judicial notice" or "presumptive guilt" are unacceptable in the area of obscenity prosecutions where First Amendment questions are integrally involved, it is equally objectionable, it is submitted, for a State to consider the trier of facts, judge or jury, as some legislative body equipped to decide for the Nation as a whole what the limits of candor are without the slightest proof in the record. The decision in *Jacobellis* rejecting any "local" definition of the community in delineating "the area of expression that is protected by the Federal Constitution" would appear to bar any attempt by a State to make a particular trier of fact in a specific obscenity prosecution the embodiment of

what constitutes the limits of candor in the Nation as a whole in the depiction and representation of sex and nudity. Such an attempt to substitute "ad hoc legislation" for proof in an obscenity prosecution is unjustified in reason and violates the basic requirements of fairness governing criminal trials in state and federal prosecutions. It has been stated: "But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86.

To turn a judge or jury in an obscenity prosecution into a "legislative" body allegedly equipped to decide what are the limits of candor in the Nation, and the extent to which the writing exceeds such limits, is to turn the triers of facts in obscenity prosecutions into local boards of censors, not only equipped to suppress writings but to attaint individuals responsible for their distribution. The end result of such state procedures is a return to *Hicklin*. This concededly, the Constitution prohibits. *Roth v. United States*, 354 U.S. 476; *Jacobellis v. Ohio*, 378 U.S. 184; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Freedman v. Maryland*, 85 S. Ct. 734.

A state criminal procedure which permits suppression and punishment without proof of an essential ingredient of the offense, an ingredient made essential by the requirements of the Constitution as interpreted by this Court, undermines the due process and free press guarantees of the First and Fourteenth Amendments. Such a procedure neither affords justice to an accused nor the appearance of justice. The right to fair notice and hearing, as well as the right of confrontation and the assistance of counsel are essentially un-

dermined. See, *Pointer v. Texas*, Oct. Term 1964, No. 577, decided April 5, 1965. 33 United States Law Week 4306; *Douglas v. Alabama*, Oct. Term 1964, No. 313, decided April 5, 1965. 33 United States Law Week 4304. In the area of the circulation of the press and the public's access to constitutionally protected material, a state procedure which relieves the prosecution of the burden of proving that speech or press is criminal opens the door wide for wholesale suppression. Such a procedure makes only the fact of condemnation known to the public and reviewing courts; the actual reason and cause for condemnation remain forever secret.

The judgment of conviction as obtained here constitutes a broad departure from many specific constitutional guarantees, including the due process guarantees "representing fundamental ideas of fair play and justice in civilized society". *In re Oliver*, 333 U.S. 257, 282. The question involved is of substantial importance to the community in general, and should, it is submitted, be determined by this Court.

2. It is also submitted that the standard of proof required under the Constitution in obscenity prosecutions has not been satisfied in this case with respect to the issue of *scienter*.[3] This Court held in *Smith v. California*, 361 U.S. 147, that the strict liability feature of the California ordinance there involved would seriously restrict the circulation of books which are not obscene, "by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold". 361 U.S. at 152. The tendency of

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[3]A similiar question is presented in *Mishkin v. New York*, Oct. Term, 1964, No. 858, probable jurisdiction noted April 5, 1965. 33 U.S. Law Week 3330.

the California ordinance, this Court held, was to erode fundamental freedoms of speech and press by holding a bookseller criminally liable for possessing an obscene book, "wholly apart from any scienter on his part regarding the book's obscenity". 361 U.S. at 160.

In view of the ruling in *Smith v. California,* and constitutional principles implicated therein, courts have required the prosecution to plead and prove that the accused knew that the material was obscene. In the recent decision of the Arizona Supreme Court (*State v. Locks,* 397 P. 2d 949 [December 23, 1964]), invalidating the state obscenity law as unconstitutionally vague, the court held that an accused "cannot be found guilty unless he had knowledge of the obscene or indecent nature of the material which it is contended he was keeping for sale and exhibiting". 397 P. 2d at 951. Noting that the words "obscene or indecent", without statutory definition, are words of "varied meaning, varying in definition from case to case" (397 P. 2d, at 951), the Arizona Supreme Court stated "it is obvious that a layman would have nothing but difficulty and confusion in his mind were he to attempt to work out his own definition of the words 'obscene or indecent' as used in A.R.S. 13-532" (397 P. 2d at 952). To similar effect, is *State v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (1958); *Demetropolos v. Commonwealth,* 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman,* 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State,* 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.,* 35 N.J. 284, 173 A. 2d 20, 23 (1961). See also, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 103-108 (1960).

If the aforesaid constitutional standard relative to *scienter* is to be maintained, plainly the proof in the record must be of "convincing clarity" to satisfy the demands of such standard. *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 284-286. See also, *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 491-495. For in the free speech and free press areas, it is essential that those alleged to be engaged in "criminal speech" shall not be condemned without "clear, convincing and unequivocal" proof of specific unlawful knowledge and intent. Such proof must be "solid". There must be "that solidity of proof which leaves no troubling doubt in deciding a question of such gravity" as is implied in an attempt to make punishable a mental state in a context of constitutionally protected freedoms. *Baumgartner v. United States,* 322 U.S. 665, 670. See also, *Hartzel v. United States,* 322 U.S. 680, 686-687; *Gonzales v. Landon,* 350 U.S. 920.[4] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied." *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 285.

It is submitted that the proof adduced in the record herein was totally inadequate to satisfy the state's constitutional burden of proof on the issue of *scienter.* The record is uncontradicted that the petitioner had no knowledge of the contents of the writings, and it is equally clear on the record that petitioner had no reason

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[4]It has been stated that the criteria of "clear, unequivocal and convincing evidence which does not leave the issue in doubt" is "substantially identical with that required in criminal cases — proof beyond a reasonable doubt". *Klapprott v. United States,* 335 U.S. 601, 612.

to believe nor did he believe that the material was obscene or otherwise unlawful. The only witness produced by the State was the arresting officer who testified that when petitioner wanted to know why he had been arrested, the officer asked petitioner why he sold such "garbage", and petitioner replied that "there is worse stuff than this around", pointing to some girlie magazines on the counter [R. 13].

Neither the inquiry of the police officer nor the reply of petitioner were related to obscenity. The officer was plainly voicing a personal dislike for material which he believed from a view of the titles and covers were in poor taste and vulgar, to wit, "garbage". That the petitioner so construed the police officer's remark is evidenced by petitioner's comparison reference to "girlie" magazines, held constitutionally protected by the highest court of the State in a number of decisions. *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 869, 252 N.Y.S. 2d 81.

There is nothing in the record to show that petitioner, a clerk, knew that the two writings he sold to the officer, at the latter's request, were obscene, nor does the record show that there was any reason for petitioner to believe that the material was violative of the State obscenity law. Books of a comparable character had previously been cleared. *People v. Birch,* 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. Cr. 1963) [books *Sex Kitten, Clipjoint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch, College for Sinners,* described as containing "a great number of descriptions of sexual activity which,

in many cases, are only tenuously associated with the plot and story line" (243 N.Y.S. 2d, at 528) — held not obscene and indictment dismissed]; *People v. Druss*, N.Y. Sup. Ct. Cr. #431-63, September 6, 1963 [obscenity indictment dismissed — books entitled *Strange Breed, Pagan, Swing Low Sweet Sinner, Sex Plan, A Rage Within, Horizontal Secretary, None But the Wicked*].

So far as the issues of petitioner's unlawful knowledge and intent are concerned relative to the alleged obscenity of these writings under the governing standards elucidated in the opinions of the courts, there is no probative evidence in the record to support the judgment of conviction. The State manifestly failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *New York Times Co., et al. v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 85 S. Ct. 209; *Manual Enterprises, Inc. v. Day*, 370 U.S. 478; *Schneiderman v. United States*, 320 U.S. 118; *Keegan v. United States*, 325 U.S. 478.

3. As a matter of constitutional judgment, the books herein involved are not, it is submitted, obscene. The writings clearly do not go beyond the customary limits of expression in language or theme found in many of the "bestsellers" in the literary world and other media of communication. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language that is found in writings of noted authors generally accepted and widely read by the public. Each of the books involved contains a plot and story line with characters and incidents relevant to such plot and theme.

This Court has repeatedly warned that the content of writings which may be suppressed is extremely limited, not to be measured by subjective reactions to disagreeable themes or candid expression. To summarize: The guarantees of the First and Fourteenth Amendments apply equally to material designed to entertain or amuse as to scientific or educational writings. *Winters v. New York,* 337 U.S. 507. A writing is not to be deemed obscene because "it does not conform to some norm prescribed by an official", or because not in "good taste", or because it is not "good literature", or because it does not have "educational value", or because it is not "refined", or because it has no "enduring values", or because it is allegedly "trash". *Hannegan v. Esquire,* 327 U.S. 146.

The Constitution protects expression, this Court has stated, without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered". *N.A.A.C.P. v. Button,* 371 U.S. 415, 445. Unless integrated with unlawful conduct, all ideas — "unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion" — have the full protection of the guaranties of the First Amendment. *Alberts v. California,* 354 U.S. 476, 484. And in *Jacobellis v. Ohio,* this Court emphasized that material dealing with sex in a manner that advocates ideas or that has any other form of social importance cannot be branded as obscenity and denied the constitutional protection. Moreover, it was stated that the constitutional status of

the material does not turn on a "weighing" of its social importance against its alleged prurient appeal, for a writing cannot be proscribed unless it is utterly without social importance.

It is submitted that the books herein have value and social importance. They have entertainment and cathartic value, and they reflect a segment of life which, if crude, is nevertheless existent. It cannot be utterly without social importance for people to learn something about the truth of the society, or a segment of the society, in which they live. This Court has stated: "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Garrison v. Louisiana,* 85 S. Ct. 209, 216.

Clearly, the books herein are comparable in their depiction of sex to those writings which have been found not to exceed the limits of candor in the Nation as a whole or to have some social importance justifying their protection under the First Amendment. See, *Tralins v. Gerstein,* 378 U.S. 576, reversing 151 So. 2d 19 (Fla. 1963) (*Pleasure Was My Business); Grove Press, Inc. v. Gerstein,* 378 U.S. 577, reversing 156 So. 2d 537 (1963); *(Tropic of Cancer); Jacobellis v. Ohio,* 378 U.S. 184, reversing 173 Ohio St. 22, 179 N.E. 2d 777 ("The Lovers"); *Grove Press, Inc. v. Christenberry,* 276 F. 2d 433, affirming 175 F. Supp. 488 *(Lady Chatterley's Lover); One, Inc. v. Olesen,* 355 U.S. 371, reversing 241 F. 2d 772 (9 Cir. 1957) ("One — The Homosexual Magazine"). See also, the separate opin-

ions of Mr. Justice Stewart in *Jacobellis v. Ohio*, 378 U.S. 184; and *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the Appellate Term.

At an Appellate Term of the Supreme Court, First Department, held at the County Court House, Borough of Manhattan, City of New York, on the 17th day of December, 1964.

Present: — Hon. Samuel M. Gold, J. P., Hon. Louis J. Capozzoli, Hon. Samuel H. Hofstadter, Justices.

The People of the State of New York, Respondent vs. Robert Redrup, Defendant-Appellant — Nov. #585.

Filed Dec. 17, 1964. Appellate Term.

An appeal having been taken to this Court by Robert Redrup, the defendant-appellant, from a judgment of conviction by Hons. Impellitteri, Castaldi, Rohan, Judges of the New York City Criminal Court, upon the charge of violation of §1141 of the Penal Law, entered on the 11th day of June, 1964, and said defendant-appellant having been sentenced by Hons. Levy, Spiegel, Whitman, Judges of said Court, on the 28th day of July, 1964, as follows:

Suspended sentence

and the said appeal having been heard and due deliberation having been had thereon,

It Is Ordered and Adjudged that the said judgment so appealed from be and the same is hereby affirmed.

Enter
SMG
Justice, Appellate Term
Supreme Court, First Department

APPENDIX B.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of New York Penal Law, Section 1141, are:

> "§1141. Obscene Prints and Articles
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . drawing, photograph motion picture film, figure, image, . . .
>
> "Is guilty of a misdemeanor . . ."
>
> (As amended L.1950, c.623, §§1-3; L.1950, c. 624; L.1954, c.703; L.1955, c.837; L.1956, cc.423, 661, 662, 681; L.1957, c.690; L.1958, cc.735, 736, eff. July 1, 1958, L.1958, c.737, §§1, 2, eff. July 1, 1958 . . .)

MAY 19 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, [redacted]

No. [redacted] 1966

ROBERT REDRUP,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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October Term, 1964

No. 1073 Misc.

ROBERT REDRUP,

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THE PEOPLE OF THE STATE OF NEW YORK,

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On Petition for a Writ of Certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Term of the Supreme Court of the State of New York for the First Judicial Department, to review a judgment of that court rendered December 17, 1964, affirming a judgment of the Criminal Court of the State of New York,

County of New York, of July 28, 1964, convicting petitioner of the sale of obscene books [New York Penal Law §1141]. Sentence was suspended (37).* Leave to appeal to the New York Court of Appeals was denied by a judge of that court [FULD, J.] on January 4, 1965.

Questions Presented

1. Whether the petitioner, having received a suspended sentence for selling obscene books, was deprived of life, liberty or property without due process of law, because the prosecution at trial failed to introduce evidence of contemporary community standards.

2. Whether the books sold by petitioner were obscene.

3. Whether the proof established petitioner's knowledge of the contents of the books he sold.

Statement of the Case

The Sale

On April 10, 1964, at about 5:50 p.m., the arresting officer approached the news-stand at 263 West 42nd Street, which is on the street level of the subway arcade, and saw displayed on a bookrack the books "Lust Pool" and "Shame Agent" (10; Peo. Exhs. 1 and 2). The officer pointed to the bookrack and said, "'Lust Pool and Shame Agent'" whereupon the petitioner, who was the clerk,

* References, unless otherwise noted, are to the pages of the record on appeal.

removed the books and put them on the counter (10). After some discussion about price, the officer paid petitioner $1.65 for both books, and the petitioner placed the books in a paper bag and handed them to the officer (11). The officer then identified himself, and exhibited a search warrant for the premises (12).

The petitioner stated to the officer that he had worked there about two years, alternating between the newsstand and the downstairs bookstore. When asked why he sold this "garbage," he replied:

> " 'There is worse stuff than that around * * * I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (13).

Testifying in his own behalf, petitioner stated that he had been employed for two years by the owner of the bookstore and newsstand. He usually worked downstairs in the bookstore, and had worked at the newsstand only for one hour on one prior occasion (17-8). He did not recollect saying anything to the officer about other books being worse than those involved in this case (18-9); nor did he say anything about the girlie magazines (20).

On cross-examination, petitioner acknowledged that it was for only the past eight months that he had worked in the bookstore. For the first sixteen months of his employment he had worked at the newsstand where he was arrested (20-1).

Exhibits

"Shame Agent" and "Lust Pool," People's Exhibits 1 and 2 respectively, are two soft covered books each containing 190 printed pages. Each book consists of a detailed narrative by the male protagonist of his sexual encounters with a number of females. Lesbianism, sadism, voyeurism and sodomy are also present.

Summary of Argument

The two books sold by petitioner to a police officer were clearly obscene. Totally devoid of any redeeming social value and appealing solely to prurient interest, both books consist of little more than a detailed, explicit, lengthy description of numerous and various sexual acts engaged in by the characters. Petitioner's knowledge of this content is readily inferred from his statement to the officer upon his arrest. Sale, obscenity and *scienter* having thus been established, no more need be proved to sustain the conviction. The Constitution imposes no burden upon the prosecution to prove what the community's standards are. Indeed, for this Court to do so, would result in a diminution of the Court's own role in independently assessing the validity of obscenity convictions.

POINT I

The books sold by petitioner were obscene.

Petitioner contends that as "a matter of constitutional judgment, the books herein involved are not * * * obscene. The writings clearly do not go beyond the customary limits of expression in language or theme found in many of the 'best sellers' in the literary world and other media of communication. Neither in language nor in theme do the books herein approach the candor of discussion, the explicitness of language that is found in workings of noted authors generally accepted and widely read by the public" (petitioner's brief, p. 23). If by "explicitness of language" petitioner means that neither book contains the so-called "four-letter" words, he is accurate. And if by "theme" he means that no book can be suppressed simply because it deals with sex, he is also correct. But neither statement tells us very much about the exhibits in the case at bar, or about the applicable law.

Reference, of course, must be made to the books themselves. It need merely be noted at this point that each book is narrated by a male protagonist who does little more than graphically describe in seemingly endless detail his sexual encounters—both natural and perverse—with numerous females, including in at least one instance, two females at the same time. Unquestionably, a reading of both books would demonstrate beyond doubt that "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest" [*Roth* v. *United States*, 354 U. S. 476, 489 (1957)]. They go "substantially beyond customary

limits of candor in description or representation of such matters" and are "utterly without redeeming social importance" [*id.* at 484, 487, n. 20; see also, *Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478, 482-8 (1962)]. Without presuming to offer a literary critique of the works, it must be noted that their pages are bare of any material that could fairly be deemed "advocacy of ideas" or of "scientific value." Apart from the fact that the English language is used to tell a story of sorts, the art of prose composition is so rudimentary that, on their face, the books serve no literary purpose [see *Jacobellis* v. *Ohio,* 378 U. S. 184, 191 (1964)].

POINT II

The proof established petitioner's knowledge of the contents of the books he sold.

The circumstances of the sale, the position of the petitioner, as well as his admission established the element of *scienter.* Indeed, his admission alone proved *scienter.* In *Smith* v. *California,* 361 U. S. 147 (1959), this Court defined *scienter* as "knowledge by * * * [defendants] of the contents of the books," and stated that circumstances might warrant the inference that the seller was aware of the contents of a book despite his denial of knowledge. Here, of course, petitioner's comment to the officer that "[T]here is worse stuff around" and his reference to other material being sold at the same time and place, could not have been made unless he knew the contents of what he had just sold the officer. His opinion as to the relative salaciousness of various books and magazines, though not binding on the trial court, was thus significant in that it revealed a knowledge of the contents of each, a fact necessary to make such a comparison.

POINT III

The prosecution in an obscenity case is not required to introduce evidence of and prove contemporary community standards.

Petitioner asserts that the constitution imposes a burden upon the state in an obscenity trial, to prove by means of independent evidence, what constitutes contemporary community standards. Absent such evidence in the record, it is argued, the prosecution must inevitably fail, since the "burden of proving in any obscenity prosecution the limits of candor in the Nation as a whole rests upon the prosecution as a requirement of due process" (petitioner's brief, p. 11).

This issue is not properly before this Court. Although petitioner, upon conclusion of the People's case, urged it as one of three grounds for dismissal of the information—the other two being the remaining issues raised in the petition—he did not argue this particular point in his brief in the appeal before the Appellate Term of the New York Supreme Court. Only two points were urged in that brief: the books were not obscene and there was no proof of *scienter*. But petitioner did prepare a brief in support of his application to Judge FULD for leave to appeal to the New York Court of Appeals, in which he added the point now being urged upon this Court. Clearly, this is insufficient to have preserved the issue for this Court, since the Appellate Term—the only appellate court to have considered the case—never passed upon it. Nor, for that matter, did the certificate denying leave to appeal indicate that the issue had been raised and decided.

In any event, though petitioner cites many cases in making the argument to this Court, none stands for the proposition advanced. If anything, the opinion of the Court in *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964), relied upon so heavily by petitioner, indicates otherwise. In that case, the Court explicitly reaffirmed the view that "the constitutional status of an obscene work must be determined on the basis of a national standard" (*id.* at 195), and rejected the argument that the Court is limited to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with the court exercising only a limited review such as that needed to determine whether the ruling below is supported by 'sufficient evidence.' The suggestion is appealing, since it would lift from our shoulders a difficult, recurring and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth* v. *United States, supra,* 354 U. S. at 497-498. Such an issue, we think, must ultimately be decided by this court (pp. 187-8).
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> • • •
>
> "Hence we reaffirm the principle that, in 'obscenity' cases as in all others involving rights denied from the

> First Amendment guarantees of free expression, this Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected" (p. 190).

In effect, it is the role of this Court which renders unnecessary formal evidentiary proof in the trial court of what the national standards are. If such proof were required this Court would truly be reduced to a mere review of the "sufficiency" of the evidence, since the Court would then simply be determining whether there was some evidence in the trial record proving *a* national standard, and whether there was some evidence that the work in question fell below that particular "national" standard. Thus, if the issue were one to be conclusively "proved" at trial this Court could hardly be expected to render its own judgment, having been bound by the "proof" at trial. Clearly, however, the Supreme Court in reviewing a judgment of conviction for obscenity, is applying what it deems to be contemporary community standards. Yet, there is no indication that this Court requires proof before it of what those standards are. Since the trial court was similarly obligated to render an independent judgment, there appears no reason why it alone should be required to demand such proof. The task of trial and appellate courts in this area is to *apply* contemporary community standards to the facts, not necessarily to *record* them in every case by means of independent proof. In the instant case, the facts are the books themselves [see *Manual Enterprises, Inc.* v. Day, 370 U. S. 478, 487-8 (1962)], and to these books the court below applied contemporary standards.

While it may perhaps be permissible for the prosecution or defense to aid the trial court or even this Court, in ascertaining what is offensive to contemporary thought [see *South* v. *California*, 361 U. S. 147, 164-7 (1959) (FRANKFURTER, J., concurring)], neither Constitution nor case law compels the prosecution to do so. There is certainly even less necessity to do so if as at least one member of this Court has indicated, we know what is obscene when we see it [*Jacobellis* v. *Ohio*, *supra* (STEWART, J., concurring)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1965

[redacted]

October Term, 1960

No. [redacted]

[redacted]

Petitioner

vs.

THE PEOPLE OF THE STATE OF NEW YORK

Respondent

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department

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BRIEF FOR THE PETITIONER

[redacted]

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IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

BRIEF FOR THE PETITIONER.

Opinions Below.

The action was tried in the Criminal Court of the City of New York, County of New York. No opinion was rendered by the three-judge court before whom the action was tried, except the statements at the conclusion of the trial finding petitioner guilty as charged (R. 23, 25-26), and suspending sentence (R. 24).

The judgment of conviction was affirmed by the Appellate Term of the Supreme Court of New York for the First Judicial Department (R. 27-28) without opinion.

An application for leave to appeal to the Court of Appeals of New York was denied (R. 28), without opinion.

Jurisdiction.

The judgment of the Appellate Term of the Supreme Court of New York for the First Judicial Department was entered on December 17, 1964 (R. 27-28). A timely application for leave to appeal to the Court of Appeals was denied on January 4, 1965 (R. 28). On March 25, 1965, by order of Mr. Justice Harlan, the time within which to file a petition for a writ of certiorari was extended to April 19, 1965 (R. 29). The petition was filed April 16, 1965, and was granted on April 25, 1966, limited to Question 4 presented by the petition (R. 30), as set forth hereinafter.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented.

Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and New York Penal Law, Section 1141, subdivision (1), are printed as Appendix A hereto.

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[1]Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart were of the opinion that certiorari should be granted on all the questions presented by the petition (R. 30).

Statement of the Case.

On April 11, 1964, a complaint was filed by a police officer, one Robert Griefenstein, averring that on the previous day the said officer had approached a newsstand at 263 West 42nd Street, located at the street level of a subway arcade in the County of New York, and spoken to an attendant at the stand and purchased two paperback books. These two books were entitled *Lust Pool* and *Shame Agent*. The police officer alleged that he paid the sum of $1.65 for the said two books and that the petitioner accepted the money. The officer also averred that the books he purchased were of a "lewd lascivious indecent nature", and that following the purchase the police officer announced his authority to the petitioner and seized six additional copies of *Lust Pool* (R. 2-3).

On April 29, 1964, a two-count Information (R. 6) was filed in the Criminal Court of the City of New York, County of New York, charging petitioner with violations of New York Penal Law, Section 1141, subdivision (1). Each count of the Information alleged that petitioner had sold an obscene book in violation of the statute. The cause came on for trial before a three-judge court in the Criminal Court of the City of New York, County of New York, on June 4, 1964 (R. 9).

The sole witness for the prosecution was police officer Griefenstein (R. 10). The officer testified that as he approached the newsstand he saw displayed in a book rack the two books herein involved. He pointed to the book rack in the presence of the clerk, petitioner herein, and said "Lust Pool and Shame Agent" (R. 10). The petitioner removed the two books from the book rack and placed them on the counter. The cost of

both books was $1.65. The police officer gave the petitioner two one dollar bills and the petitioner gave him $.35 change. Then petitioner placed the two books in a brown paper bag and handed it to the police officer [People's Exs. 1, 2, 3; R. 11].

After having made the purchase, Patrolman Griefenstein identified himself as a police officer. Petitioner asked him what was wrong and the officer told petitioner that he had a search warrant for the premises (R. 11-12). The officer asked petitioner whom he worked for (R. 12). Petitioner replied that he had been in the employ of a Mr. Block for some two years; that he alternated between the newsstand and the book store which was down the stairs in the subway itself. The petitioner earned $75.00 per week (R. 12). The officer asked petitioner: "Why do you sell this garbage?" Petitioner replied: "There is worse stuff than that around"; stating, "I think these books here are worse", referring, stated Officer Griefenstein, to "girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (R. 12).[2]

The aforesaid was the People's case (R. 13).

Petitioner moved to dismiss each count of the Information upon the grounds, among others, "that the People have failed to prove scienter, any knowledge of the contents of the book, either book, or that defendant

[2]On cross-examination, the officer admitted that he made no note of the conversation nor did he refer to it in the complaint (R. 2-3) which was filed, although it was his custom to make notes of conversations with persons whom he arrested (R. 12-13).

had any reason to believe that the books came within the prohibition of the law" (R. 13).

Petitioner testified that his principal duty was working in the book store in the arcade of the subway where paperbacks covering a wide variety of literary, scientific and popular subjects were sold (R. 14-15). Another man was ordinarily assigned to the newsstand, but the man had been ill and petitioner had filled in for him for an hour until the arrival of another employee (R. 15). Petitioner told the officer that he was up at the newsstand for only an hour because of the illness of the other employee for whom he was filling in (R. 16). Petitioner had never seen the two books here involved before the officer asked for them (R. 16). He had never been arrested nor convicted of any offense prior thereto (R. 16), nor did he recall any conversation as related by the police officer (R. 16).

After petitioner rested, petitioner renewed the motions made to dismiss and moved for judgment of acquittal on the ground that the People had failed to prove petitioner's guilt beyond a reasonable doubt (R. 22). The Court reserved decision. On June 11, 1964, the Court announced it had reached a decision: "The court has read the two books involved in this case and the motion to dismiss is denied as to each count of the information and the defendant is found guilty as charged of both counts of the information." (R. 23). On July 28, 1964, petitioner received a suspended sentence (R. 24).

On December 17, 1964, the Appellate Term of the Supreme Court of New York for the First Judicial Department affirmed the judgment of conviction, without opinion (R. 27-28). Application for leave to appeal to the Court of Appeals of the State of New York was denied, without opinion, on January 4, 1965 (R. 28).

Summary of Argument.

The statute herein has been so construed and applied as to authorize the conviction of the petitioner without proof that petitioner had knowledge of the contents or the alleged obscenity of the books involved.

In *Smith v. California,* 361 U.S. 147, the state ordinance imposing absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word was held invalid under the free speech and press provisions of the First and Fourteenth Amendments. It was held that scienter and mens rea are constitutionally required ingredients of the offense of obscenity; that the elimination of a scienter requirement substantially restricts freedoms of speech and press, and impels a self-censorship which ultimately deprives the community of access to constitutionally protected material. An obscenity statute which, on its face and as construed and applied, eliminates scienter, is unconstitutionally vague, both as a matter of procedural due process and substantive due process. The punishment of innocent and guiltless behavior, it was held in *Smith,* would run counter to the protections afforded by the Constitution.

In ordinary criminal cases, the burden is always on the prosecution to plead and prove every essential ingredient of the offense. Since obscenity prosecutions implicate questions of speech and press, due process clearly requires that the State bear the burden of persuasion to show that an accused knew that the material involved was obscene and, with such guilty knowledge, disseminated the material with the intent of appealing to prurient interest.

The case herein involves the question of the constitutional sufficiency of proof necessary to establish guilty knowledge and unlawful intent. This Court has constantly held that its review is not limited to the elaboration of constitutional principles; that in proper cases the Court must review the evidence to make certain that those principles have been constitutionally applied. The performance of this duty is especially required when the question is one of where the line should be drawn between constitutionally protected expression and alleged criminal speech.

The standards for assessing adequacy of proof needed to make out a case of criminal speech are necessarily strict if the guarantees of the provisions of the Bill of Rights are to be preserved. In the context of a penal statute which purports to punish the dissemination of obscene writings, the Constitution requires that the essential elements of obscenity, and the unlawful knowledge and purpose of the accused, be established beyond a reasonable doubt. If freedom of expression is to be

safeguarded, proof of guilty knowledge and unlawful intent in any obscenity prosecution must be clear, convincing, unequivocal and beyond doubt.

Measured by the requisite constitutional standards, the evidence in the record herein is clearly inadequate to sustain the judgment of conviction. The proof is insufficient to show either knowledge of the contents of the writings by the petitioner or any reason for the petitioner to believe that the material was obscene or otherwise unlawful. The evidence in the record is too insubstantial and lacking in any probative value to support the judgment of conviction. The State manifestly failed to meet the constitutional burden of proof. The broad protections of freedoms of speech and press would be seriously endangered if a judgment of conviction in an obscenity prosecution were to be sustained on the basis of the meager and flimsy evidence presented in the record herein.

ARGUMENT.

I.

The State Statute, as Construed and Applied to Authorize the Conviction of the Petitioner Herein Without Proof That the Petitioner Had Knowledge of the Contents or the Alleged Obscenity of the Books Involved, Deprives Petitioner of His Liberty Without Due Process of Law, and Abridges the Exercise of Freedoms of Speech and Press, Contrary to the Due Process and Free Speech and Press Provisions of the First and Fourteenth Amendments.

(a) The case herein involves important constitutional issues with respect to the quality of proof necessary to show scienter and mens rea in obscenity prosecutions. The fundamental question presented is whether the evidence in this record can constitutionally sustain the judgment of conviction rendered against petitioner under the principles enunciated by this Court and the demands of the Constitution.

The constitutional issues here involved should, it is submitted, be considered in the context of the basic constitutional postulates which should govern determination of issues of scienter and mens rea in an obscenity prosecution.[3]

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[3]The constitutional standards and criteria for judging issues of guilty knowledge and unlawful purpose in obscenity prosecutions were discussed in detail in Point I of the Brief for the Petitioner in the companion case of *Austin v. Kentucky*, October Term, 1966, No. 16, in which chief counsel for petitioner therein is the same as chief counsel for petitioner herein. Counsel does not therefore repeat, but incorporates by reference, the detailed analysis made in the *Austin* brief with respect to the general principles which should govern issues of scienter and mens rea in obscenity prosecutions. It may be helpful, however, to briefly summarize the conclusions which were reached in Point I of the *Austin* brief.

Every obscenity prosecution involving as it does books, writings and other media of communication, implicates questions of protection for freedoms of speech and press. Material which is not obscene is ordinarily entitled to the protection of the provisions of the First Amendment. It is important, it is submitted, to recall that freedoms of speech and press have been held by this Court to contain values which are essential in a democratic society; and it is, therefore, of the utmost significance that standards for judging obscenity and scienter be narrowly confined in order to safeguard freedom of expression.

It was not until the decision in *Roth v. United States,* 354 U.S. 476, that this Court undertook to define "obscenity" in the light of the demands of the First Amendment. Rejecting the *Hicklin* standard as unconstitutionally restrictive of freedoms of speech and press, this Court has held that the essential elements required to be established in any obscenity prosecution include: (1) the material must go substantially beyond customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.

In *Smith v. California,* 361 U.S. 147, the Court struck down a California ordinance which imposed strict or absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word. The reasons advanced by the

Court for holding that the elimination of scienter in obscenity prosecutions was constitutionally impermissible were as follows: that elimination of the scienter requirement would substantially restrict freedoms of speech and press; that such a procedural device would cause a self-censorship detrimental to the community and its access to constitutionally protected material; that a statute which eliminated scienter would be unconstitutionally vague, both as a matter of procedural due process and substantive due process; and that the punishment of innocent and guiltless behavior would clearly run counter to the protections afforded by the Constitution.

Since scienter and mens rea are therefore constitutionally required ingredients of the offense of obscenity, it would follow under the decisions of this Court that the burden is on the prosecution to plead and prove scienter and mens rea. It is of course settled that in criminal cases the burden is always on the prosecution to plead and prove every essential ingredient of the offense. Moreover, since obscenity prosecutions involve questions of speech and press, due process would certainly require that the State bear the burden of persuasion to show that an accused engaged in criminal speech.

The case herein should be considered, it is submitted, in the context of the aforesaid constitutional principles. These proceedings present a separate issue in the area of scienter and mens rea, to wit, the constitutional sufficiency of the proof necessary to establish guilty knowledge and unlawful intent. The questions presented are, first, what are the standards for assessing the adequacy of proof needed to make out a case of scienter and mens rea in obscenity prosecutions; and,

second, whether those standards have been met in the record presented in the case herein.

(b) Since a judgment involving freedoms of speech and press affects the exercise of freedoms deemed essential to the vitality of democratic institutions and a self-governing society, this Court has constantly held that the record upon which such a judgment is based will always be reviewed with the scrupulous care demanded by our Constitution.

Hence, in *Niemotko v. Maryland,* 340 U.S. 268, 271, the Court stated: "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded." In *Napue v. Illinois,* 360 U.S. 264, 271, it was held: "The duty of this Court to make its own independent examination of the record when federal constitutional deprivations are alleged is clear, resting, as it does, on our solemn responsibility for maintaining the Constitution inviolate."

In *Blackburn v. Alabama,* 361 U.S. 199, a case involving alleged violations of the Due Process Clause of the Fourteenth Amendment, this Court held: "It is well established, of course, that although this Court will accord respect to the conclusions of the state courts in cases of this nature, we cannot escape the responsibility of scrutinizing the record ourselves" (361 U.S. at 205, fn. 5). In *Edwards v. South Carolina,* 372 U.S. 229, a case involving rights of free speech, free assembly and freedom to petition for redress of grievances, this Court noted that it "remains our duty in a case such as this to make an independent examination of the whole record" (372 U.S. at 235).

In *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, this Court elaborated the constitutional principle with respect to review of judgments involving First Amendment rights.

> "Since respondent may seek a new trial, we deem that considerations of effective judicial administration require us to review the evidence in the present record to determine whether it could constitutionally support a judgment for respondent. This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' Speiser v. Randall, 357 U.S. 513, 525, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' . . ." (376 U.S. at 284-285).

See also, *Jacobellis v. Ohio,* 378 U.S. 184, 189.[4]

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[4]"And this Court will review the finding of facts by a State court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. . . ." *Fiske v. Kansas,* 274 U.S. 380, 385. See also, *Thompson v. City of*

(This footnote is continued on the next page)

(c) The standards for assessing the adequacy of proof needed to make out a case of criminal speech are necessarily strict if the guarantees of the provisions of the Bill of Rights are to be preserved. In the context of a penal statute which purports to punish the dissemination of obscene writings and other media of communication, the Constitution would appear to require that the essential elements of obscenity as defined by this Court, and the unlawful knowledge and purpose of the accused, be established beyond a reasonable doubt.

If the State contends that it has a right to prevent the dissemination of a writing or other medium of communication, then, at the very least, the proof of specific unlawful knowledge and intent should be "solid". The evidence should be "substantial and beyond reasonable doubt", "clear, convincing and unequivocal", and "free from doubt". The factfinder should not be permitted to infer ultimate facts of scienter and mens rea from evidence based on suspicion, conjecture and surmisal, or on the basis of piling inference upon inference without any rational connection between the fact proved and the fact presumed. Proof of guilty knowledge and unlawful intent cannot be established by reliance on some isolated and equivocal utterance to establish the specific guilty knowledge and criminal intent which the law condemns.

On issues of scienter and mens rea, particularly where these issues are related to such complex questions as the extent of community toleration, appeal to prurient interest and the social importance of books and other

---

Louisville, 362 U.S. 199; *Schware v. Board of Bar Examiners*, 353 U.S. 232; *Garner v. Louisiana*, 368 U.S. 157; *Taylor v. Louisiana*, 370 U.S. 154; *Shuttlesworth v. City of Birmingham*, 382 U.S. 87.

media of communication, the record requires scrupulous scrutiny. Since this Court has held that one of the principal dividing lines between constitutionality and unconstitutionality in the application of obscenity statutes is proof of scienter and mens rea, the freedoms to exercise speech and press will to a large degree depend upon the quality of the evidence deemed sufficient to support findings of guilty knowledge and unlawful intent. If freedom of expression is to be safeguarded, proof of guilty knowledge and unlawful intent in any obscenity prosecution must, it is submitted, be clear, convincing, unequivocal and beyond doubt.

The aforesaid principles are distilled from the decisions of this Court. In *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, there was admittedly proof of falsity in the statements made in the advertisement published in the newspaper, and there was proof of failure on the part of the employees of the newspaper to check the accuracy of the statement. Nevertheless, this Court held, "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open", that the record did not support a finding of actual malice (376 U.S. at 270). Applying the protective standards of the First and Fourteenth Amendments, the Court stated "that the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands, and hence that it would not constitutionally sustain the judgment for respondent under the proper rule of law" (376 U.S. at 285-286).

In *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, one of the issues presented was whether the petitioners in the said case knew that some of the third-party ad-

vertisers were in the possession of alleged "hard-core" photographs, although the advertisements of such material in petitioners' magazines were admittedly not obscene. On the issue of scienter, Justice Harlan, announcing the judgment of the Court, held first, that the applicable federal statute must be construed as requiring proof that the publisher of the magazines knew that some of his advertisers were offering to sell obscene material. The scienter requirement was held to be constitutionally required under the decision in *Smith v. California,* 361 U.S. 147, and for reasons similar to those advanced in *Smith.* Secondly, turning to the record in the case, Justice Harlan rejected the "remote" and "general" testimony presented by the postal officials. It was held that an obscenity statute which requires proof of scienter "is not satisfied, as the Government suggests it might be, merely by showing that a defendant did not make a 'good faith effort' to ascertain the character of his advertiser's materials" (370 U.S. at 493). Justice Harlan added:

> "At best the Government's proof showed no more than that petitioners were chargeable with knowledge that these advertisers were offering photographs of the same character, and with the same purposes, as those reflected in their own magazines. This is not enough to satisfy the Government's burden of proof on this score." (370 U.S. at 494-495).

In *Hartzel v. United States,* 322 U.S. 680, the accused was charged with violation of the Espionage Act by wilful attempt to cause insubordination in the Armed Forces and wilful obstruction of the recruiting and enlistment service of the United States. The proof

showed, among other things, that the defendant distributed secretly and anonymously to Army officers and registrants under the Draft Act articles against the war, our allies, Jews and the President of the United States. There was proof that defendant intended to create sentiment against the war among the White races and to unite them against the Yellow races (322 U.S. at 682-686). Nevertheless, this Court held that the requisite specific intent had not been proved beyond a reasonable doubt, and reversed the judgment of conviction. "Thoughtlessness, carelessness and even recklessness are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime" (322 U.S. at 689). See also, *Keegan v. United States,* 325 U.S. 478, 480-495.

In *Herndon v. Lowry,* 301 U.S. 242, the defendant was charged with an attempt to induce others to join in combined resistance to the lawful authority of the State with intent to deny, to defeat, and to overthrow such authority by open force, violent means and unlawful acts. The evidence showed that the defendant was a paid organizer for the Communist Party, whose duties included creating an organization of the Party in Atlanta, Georgia. When arrested, defendant was found to have in his possession receipt books and membership books, considerable Party literature dealing with the revolutionary theories of Marxism and self-determination for the Negro people in the South (301 U.S. at 250). On the issue of the accused's "intent to incite insurrection" (301 U.S. at 253), the Court stated as follows:

> ". . . We are of opinion that the requisite proof is lacking. From what has been said above with re-

spect to the evidence offered at the trial, it is apparent that the documents found upon the appellant's person were certainly, as to some of the aims stated therein, innocent and consistent with peaceful action for a change in the laws or the Constitution. The proof wholly fails to show that the appellant had read these documents; that he had distributed any of them; that he believed and advocated any or all of the principles and aims set forth in them, or that those he had procured to become members of the party knew or approved of any of these documents.

"Thus, the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it. . . ." (301 U.S. at 259-260).

In *Baumgartner v. United States,* 322 U.S. 665, an action was brought by the Government to set aside a naturalization decree and cancel the certificate of naturalization. The District Court entered a decree for the Government and the Court of Appeals affirmed, both courts finding on the record sufficient support for findings of falsity and fraud in the procurement of the certificate. Despite the concurrent findings of the two lower courts, this Court held that the measure of proof requisite to denaturalize a citizen had not been met. It was held that the proof was not "clear, unequivocal and convincing", as required in cases which lie "close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship" (322 U.S. at 672). The Court held "that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that

citizenship was disloyally acquired. . . . The evidence in the record before us is not sufficiently compelling to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity" (322 U.S. at 676-677). See also, *Schneiderman v. United States,* 320 U.S. 118, 125; *Gonzales v. Landon,* 350 U.S. 920; *Noto v. United States,* 367 U.S. 290, 299; *Edwards v. South Carolina,* 372 U.S. 229; *Wood v. Georgia,* 370 U.S. 375. *Cf., United Mine Workers of America v. Gibbs,* 383 U.S. 715, 737.

It follows from the aforesaid decisions and other related rulings by this Court that where issues are presented "involving factual matters entangled in a constitutional claim" (*Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 488) that this Court will always review the evidence in the record to determine whether or not the judgment involved is supported by the clear, convincing and unequivocal proof demanded by the Constitution. Unless proof of scienter and mens rea in an obscenity prosecution is convincingly clear and without doubt, a judgment based thereon must be annulled if the safeguards for the protections of freedoms of speech and press are to be maintained.

(d) Measured by the aforesaid requisite constitutional standards, the evidence in the record herein is clearly inadequate to sustain the judgment of conviction.

It is uncontradicted that the petitioner was merely a clerk who alternated between the newsstand where the arrest was made and the book store down the stairs in the subway itself (R. 12). As a matter of fact, petitioner had only been at the newsstand for about one hour on two earlier occasions besides the one on which

he was arrested. His principal duty was working downstairs in the book store (R. 14-15). Petitioner had never been arrested nor convicted of any offense before the arrest and conviction herein (R. 16).

The proof is insufficient to show either knowledge of the contents of the writings by the petitioner or any reason for the petitioner to believe that the material was obscene or otherwise unlawful. The price of the two books was nominal, one costing 90¢ and the other 65¢. Petitioner testified that he had never seen either of the two books involved herein before the time when the police officer made his purchase (R. 16).

Neither the inquiry of the police officer nor the alleged reply of petitioner (R. 12) were related to obscenity. The officer took it upon himself to voice a personal dislike for material which he believed from a view of the titles and covers were in poor taste and vulgar, to wit, "garbage". That the petitioner so allegedly construed the police officer's remark is evidenced by the purported comparison reference to "girlie" magazines, publications which had been held constitutionally protected by the highest court of the State in a number of decisions. *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760 (1964).

Thus, the alleged conversation offered by the prosecution proved only that the petitioner clerk was innocent of any guilty knowledge or unlawful intent. Moreover,

petitioner took the stand and testified that he did not recall having such conversation with the officer or making any reference to the magazines which were on the counter (R. 16). The general distrust of testimony purporting to foist upon an accused some extrajudicial oral statement has been noted by *Wigmore. Evidence* (3rd Ed. 1940) Vol. 4, §1056.

The entire record, it is submitted is too insubstantial and lacking in any probative value to support the judgment of conviction herein. The State manifestly failed to meet the high burden of proof imposed upon the State under the Constitution when First Amendment rights are involved.

The judgment of conviction herein, based upon inadequate evidence in support of the elements of scienter and mens rea, deprives petitioner of his liberty without due process of law because it deprives petitioner arbitrarily of a fair trial, undermines the presumption of innocence, relieves the prosecution of the obligation to produce evidence to sustain the burden of proving guilt beyond a reasonable doubt, and generally operates to punish innocent and guiltless behavior, all in violation of the procedural due process guarantees of the Fourteenth Amendment. Moreover, the judgment of conviction, resting on an inadequate record to prove scienter and mens rea, violates the spirit and letter of the decision of this Court in *Smith v. California*, 361 U.S. 147. The vagueness of the statute, as construed and applied by the state court to the petitioner herein, results in a pervasive censorial restriction on freedom of

expression, compelling the same self-censorship by booksellers which this Court noted in *Smith v. California*. The broad protections of freedoms of speech and press would, it is submitted, be seriously endangered if a judgment of conviction in an obscenity prosecution were to be sustained on the basis of the meager and flimsy evidence presented in the record herein in support of charges of guilty knowledge and unlawful intent.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of New York Penal Law, Section 1141, are:

> "§1141. Obscene Prints and Articles
>
> 1. A person who sells, lends, gives away, distributes, shows or transmutes, or offers to sell, lend, give away, distribute, show or transmute, or has in his possession with intent to sell, lend, distribute, give away, show or transmute, . . . or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent, sadistic, masochistic or disgusting book . . . drawing, photograph motion picture film, figure, image, . . .
>
> "Is guilty of a misdemeanor. . . ."
>
> (As amended L. 1950, c.623, §§1-3; L.1950, c. 624; L.1954, c.703; L.1955, c.837; L.1956, cc.423, 661, 662, 681; L.1957, c.690; L.1958, cc.735, 736, eff. July 1, 1958, L.1958, c.737, §§1, 2 eff. July 1, 1958 . . .)

SUPREME COURT, U. S.
AUG 26 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 3

ROBERT REDRUP, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent.*

ON WRIT OF CERTIORARI TO THE APPELLATE TERM OF THE SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

No. 16

WILLIAM L. AUSTIN, *Petitioner,*

vs

COMMONWEALTH OF KENTUCKY, *Respondent.*

ON WRIT OF CERTIORARI TO THE MCCRACKEN CIRCUIT COURT OF MCCRACKEN COUNTY, COMMONWEALTH OF KENTUCKY

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

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BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

STATEMENT

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to these actions, in support of petitioners' appeals.

INTEREST OF THE *AMICUS CURIAE*

CPDA is a national trade association of more than 700 local independent wholesalers of magazines and paperback books. For the most part, the members of CPDA distribute all leading magazines (for example, *Time, Life, Look, Saturday Review of Literature, TV Guide* and *Family Circle*) and all leading lines of paperback books (for example, Pocket Books, Bantam Books, Dell and New American Library). The majority of magazines and paperback books sold in retail outlets in the nation are distributed by CPDA members. Because of the economics of distribution, there are many communities in which there is only one paperback book and magazine wholesaler, and there are many retail outlets whose sole source of such products is a local wholesaler.

These two criminal actions involve the question of the circumstances under which "knowledge" of the obscenity of a publication may be imputed to a wholesaler or retailer who had no role in the publication, had no knowledge of the publication's contents, had no reason to know that the publication was obscene, and believed, in good faith, that he was selling constitutionally protected non-obscene literature.

The members of CPDA are vitally interested in the outcome of these prosecutions because it is they, and their retail customers, who will be the victims of any holding which permits an obscenity prosecutor to prove scienter when the only evidence is (a) that an obscene publication was sold; and (b) that the seller knew that the publication dealt with sex and was frowned upon by certain segments of the community. It is the members of CPDA, and their retail customers, who must take the law laid down in these cases, weigh the dangers and expenses involved, and decide whether to distribute material dealing with sex or capitulate completely to public and private censors. If guilty "knowledge" can be imputed

under the facts of these cases, wholesalers and retailers are likely to refuse to handle any publication which touches upon sex and which offends any pressure group or public official. And when this happens, the public will be denied access to constitutionally protected literature.

As small businessmen who tend to live in the community in which they distribute, who object to the distribution of obscenity, and who are concerned with the image of the publishing industry, the members of CPDA seek a determination in these actions which will enable law enforcement officials to stop the calculated purveyance of obscenity without impeding the distribution of constitutionally protected literature. We submit this brief in the hope that it will aid the Court in this task.

THE ACTIONS

The pertinent facts are presented in the petitioners' briefs and need not be repeated here. Simply stated, the issue in the *Redrup* case (No. 3) is whether "knowledge" of obscenity can be imputed to a retail clerk who was completely unfamiliar with the books in question, who did not regularly work in the retail outlet where the sale was made, but who failed to contest an arresting officer's statement that a book was "garbage".

In the *Austin* case (No. 16) the issues are (a) whether a state statute may require "knowledge" to be presumed from a finding of obscenity and sale, and (b) whether a defendant may be denied the opportunity to prove that he, in fact, had no guilty knowledge, took reasonable steps to insure that he did not sell obscene literature, and believed, in good faith, and on rational grounds, that he was selling only constitutionally protected non-obscene literature.

The cases are similar in that they seem to raise the question, not specifically answered in *Smith* v. *California*, 361 U. S. 147 (1959), of the circumstances under which guilty "knowledge" can be imputed. It is our position that this question need not be answered on the facts of these cases. However, we consider this matter of such prime importance that we will first attempt to formulate criteria for scienter which would prevent obscenity peddlers from evading the law by closing their eyes, and would achieve this result without the collateral effect of rendering the scienter requirement of *Smith* meaningless. To paraphrase MR. JUSTICE FRANKFURTER, we will attempt to formulate a standard which will enable law enforcement officials to roast the pig without burning down the house. *Butler* v. *Michigan*, 352 U. S. 380, 383 (1957).

The cases are also similar in that the state in each case seeks a holding which would, in effect, overrule *Smith*. If New York proved scienter in *Redrup*, any state can prove scienter by merely establishing that the defendant sold the publication and knew that there were groups which considered the publication to be "garbage". If Kentucky proved scienter in *Austin*, any state can do the same by enacting a similar presumption statute and by similarly denying a defendant the opportunity to prove lack of guilty knowledge. To impute "knowledge" under such circumstances is to reduce the issue of scienter to a mere formality on which the state must always prevail.

Thus, each case could be fully and fairly decided by holding that, on the records below, there is no satisfactory proof of scienter. The final portions of this brief will discuss the insufficient proof of scienter in each of the actions.

POINT I.

UNDER THE FIRST AND FOURTEENTH AMENDMENTS GUILTY "KNOWLEDGE" MAY NOT BE IMPUTED TO A SELLER WHO LACKS KNOWLEDGE OF THE PUBLICATION'S CONTENTS AND BELIEVES, IN GOOD FAITH, AND ON RATIONAL GROUNDS, THAT THE PUBLICATION IS NOT OBSCENE.

A. Suggested Criteria for Determining Scienter

If erosion of the right of free speech is to be avoided, criteria for determining scienter must take cognizance of the economic realities of distribution in the publishing industry. To protect First Amendment freedoms, such criteria should be formulated in light of the facts (a) that distributors are under great pressure from public and private censors to suppress virtually all publications dealing with sex (see Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960)), (b) that it is economically impossible for distributors to read the thousands of publications which they handle, many of which are dated and must be put on the stands almost as soon as they are received, (c) that most distributors are small businessmen who cannot afford to retain lawyers to advise them on obscenity questions, and (d) that since there is no litmus test for obscenity, there are many instances in which attorneys will not be able to render a reliable opinion on the question of whether a particular publication is obscene. Such criteria must also recognize that wholesalers and retailers are in business to make a living, not constitutional history by proving, at their peril, that a particular publication is not obscene; few (if any) distributors are willing to risk freedom, livelihood and reputation in the hope that this Court will ultimately hold a publication to be non-obscene.

If the criteria for establishing scienter ignore these factors, they "must inevitably result in suppressing protected speech" since they will cause wholesalers and retailers to refrain from handling constitutionally protected material. *Speiser* v. *Randall*, 357 U. S. 513, 529 (1958); see *Smith* v. *California*, 361 U. S. 147 (1959); *Marcus* v. *Search Warrant*, 367 U. S. 717, 731-733 (1961); *Winters* v. *New York*, 333 U. S. 507, 517-520 (1948).

We respectfully suggest that the following standard, which recognizes these factors, would enable law enforcement officers to prevent the calculated purveyance of obscenity without undermining the First and Fourteenth Amendments:

> Guilty "knowledge" of obscenity cannot be imputed to a seller who lacks knowledge of the publication's contents and believes, in good faith, and on rational grounds, that the publication is not obscene.

As this standard is formulated for use in criminal actions concerning First Amendment freedoms, the burden of proof on the issue of scienter must, of course, be the prosecutor's. *Speiser* v. *Randall*, 357 U. S. 513 (1958); *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 491-495 (1962).

On the facts before this Court, it is unnecessary to consider in detail the type of evidence which might establish lack of good faith or absence of rational ground for belief that a publication is not obscene. Threats and charges by private vigilante groups would not be sufficient and should be considered irrelevant since such groups are perpetually objecting to the sale of constitutionally protected literature. See Lockhart and McClure, "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960). Similarly, threats by state officials

should not be sufficient as such threats are frequently irresponsible and may well be unconstitutional. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963).

Evidence which could be used by a state in attempting to prove scienter against a distributor might include knowledge by the defendant that the publication had been previously adjudged obscene by a court, knowledge by the defendant that the publisher had been convicted for publishing obscene literature of a similar type, prior conviction of the defendant for selling similar publications, participation by the defendant in the publishing of the items in question (see *Mishkin* v. *New York*, 383 U. S. 502 (1966)), and promotional activities by the defendant which stress the prurient nature of the publication (see *Ginzburg* v. *United States*, 383 U. S. 463 (1966)).

B. The Lack of Scienter in Each Action

Applied to the cases at bar, the standard suggested above establishes that there was no scienter in either action. Neither defendant knew the contents of the publications in question (*Redrup* Record, p. 16; *Austin* Record p. 38).

There is no evidence that petitioner Redrup had reason to know that the books he sold were illegal. To the extent that the *Redrup* record has any evidence concerning scienter, it demonstrates that the defendant believed that his occasional work at the newsstand and the sale of his employer's product was fully legal (*Redrup* Record, pp. 14-21).

Petitioner *Austin* took reasonable and suitable steps to insure that none of the 11,000 titles in his book store would be obscene. The record on his appeal demonstrates that no one ever suggested to him that any of his products were obscene, and that he believed, and had every reason to believe, that he was handling constitutionally protected literature exclusively. (*Austin* Record, pp. 28-38, 49-50; see pp. 12-14 below).

Moreover, if prior to the sales in question, petitioners Redrup and Austin had retained attorneys to advise them whether the publications here involved were obscene, it is far more likely than not that these attorneys, after studying the reported cases, would have rendered the opinion that petitioners had a constitutional right to sell each of these publications. *E.g., Manual Enterprises, Inc.* v. *Day,* 370 U. S. 478 (1962); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *Sunshine Book Co.* v. *Summerfield,* 355 U. S. 372 (1958), reversing 249 F. 2d 114 (D. C. Cir. 1957); *Grove Press, Inc.* v. *Gerstein,* 378 U. S. 577 (1964), reversing 156 So. 2d 537 (Fla. Dist. Ct. App. 1963); *People* v. *Richmond County News, Inc.,* 9 N. Y. 2d 578 (1961).

POINT II

THERE IS NO PROOF OF SCIENTER IN *REDRUP*.

No matter what criteria are used for determining whether "knowledge" of obscenity can be imputed, there can be no finding, consistent with the First Amendment (or with common sense), that petitioner Redrup is chargeable with knowledge of the contents of the publications he sold. It is hard to imagine a seller who could have less knowledge or a record on which there is less basis for imputing knowledge.

Redrup was a $75 a week clerk who did not normally work in the outlet where the sale was made. (12, 14-15)* The outlet sold newspapers, leading news and general interest magazines, sports magazines, racing magazines, "girlie" magazines and paperback books (20-21). Redrup did not order the books in question; he did not read them; he had never even seen them (16). All he knew was that a police-

*All references in Point II are to the record in *Redrup*.

man ordered two books by title (10-11), and that it was his duty, as an employee, to sell the products of the newsstand.

If this is sufficient to establish scienter and make Redrup a criminal, it becomes very hazardous to work in establishments which sell books dealing with sex.

There is, in fact, no scienter requirement if scienter is established by showing merely a sale and acquiescence in a policeman's statement that a publication is "garbage". (Interestingly enough the policeman made no note of his alleged conversation with Redrup and did not refer to it in his complaint, although it was his practice to make written notes of such conversations [12-13]; Redrup denied any such conversation [16].) After all, many publications which are "garbage" in the eyes of the police are constitutionally protected. (See the cases cited at page 8 above.) If the New York District Attorney proved scienter on the *Redrup* record, there is probably no case in which scienter cannot be proved. The scienter requirement laid down in *Smith* v. *California* then becomes an easily evaded fiction, and *Smith* is effectively overruled.

POINT III

THERE IS NO PROOF OF SCIENTER IN *AUSTIN*.

A. Section 436.100 of the Kentucky Revised Statutes Is Unconstitutional On Its Face and as Applied to Petitioner Austin.

Petitioner Austin was convicted and sentenced under Section 436.100 of the Kentucky Revised Statutes. This statute provides, in pertinent part, that the sale of obscene printed material "shall be prima facie evidence that the seller . . . had knowledge of the obscene character of the

printed matter. . . ." (The full text of the statute is set out in the Appendix hereto.)

Section 436.100 is unconstitutional for at least three reasons. First, under the Fourteenth Amendment, for a state to prove a criminal case through the use of an evidentiary presumption, there must be, at a minimum, a logical nexus between the fact proved and the fact to be presumed. *E.g., Tot* v. *United States,* 319 U. S. 463 (1943); *Western & Atl. R. R.* v. *Henderson,* 279 U. S. 639 (1929). There is no such nexus in *Austin.*

When, as here, a man, who is engaged in other enterprises, owns a book store (in which he spends little time), and takes reasonable steps to insure that his store will not handle obscene publications (28-39, 49-50)*, it is completely unreasonable to presume that he knew of the allegedly obscene character of two magazines (out of 11,000 titles) which he never saw and did not know he was distributing (30, 38). If scienter can be presumed under such circumstances, there is, in effect, no scienter requirement, *Smith* v. *California* notwithstanding.

Second, the presumption is unconstitutional because, as in *Speiser* v. *Randall,* 357 U. S. 513 (1958), it shifts the burden of proof to the defendant on a question involving First Amendment freedoms, and thereby impairs these freedoms. If a bookseller knows that he will have the burden of proving lack of scienter in a criminal obscenity action, he will be reluctant to handle materials dealing with sex. The results will be that a great deal of constitutionally protected literature will not be offered for sale and the freedoms guaranteed by the First Amendment will be effectively undermined. The language of MR. JUSTICE BRENNAN in *Speiser* v. *Randall, supra,* is fully applicable here:

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*Unless otherwise indicated, references in Point III are to the record in *Austin.*

". . . The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. . . . Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. *Kingsley Books, Inc.*, v. *Brown, supra.*

"The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of

escape from constitutional restrictions.' *Bailey* v. *Alabama*, 219 U. S. 219, 239." (357 U. S. at 525-526).

See also *Freedman* v. *Maryland*, 380 U. S. 51, 58 (1965); *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478, 491-495 (1962).

Third, since under the Kentucky statute a defendant can only prove lack of scienter by taking the stand in a criminal action brought against him, the statutory presumption effectively denies him his Fifth and Fourteenth Amendment right to remain silent. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

B. Petitioner Austin Was Not Permitted to Prove Lack of Scienter.

Petitioner Austin was not permitted to establish, as a defense, that there was no scienter. Evidence that he wrote to the publisher of the magazines in question that it should "never under any circumstances, ship us any publications that does (sic) not have a second class permit" was kept from the jury (33-34).*

Similarly, the trial court would not permit testimony (a) that Austin believed that the magazines in question had second class mailing privileges (32), or (b) that his warehouse foreman was instructed to withhold from distribution any magazine which lacked such privileges (49-50). (Obscene magazines cannot receive second class mailing privileges. 18 U. S. C. A. §§ 1461, 1463; 74 Stat. 654, 655, 666 (1960), 39 U. S. C. A. §§ 4001, 4006, 4354.)

*This letter was marked as an exhibit for identification at the Circuit Court trial (34). For some inexplicable reason, it has not been printed as part of the record to this Court. We understand that this letter, which is an essential part of the record below, will be made available to the Court.

Moreover, testimony was excluded which would have established that it was not possible to check all of the publications placed on sale (30-31, 50).

In addition, Austin was not permitted to prove the contemporary community standards by which he could judge the question of a publication's obscenity or non-obscenity. See, for example, the definition of obscenity in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General,* 383 U. S. 413, 418 (1966). The record indicates that proof of such standards would have demonstrated a good faith belief that the publications at issue did not exceed community mores and were not obscene (37, 53-58, 60-65).

In depriving Austin of an opportunity to prove his defense of no scienter, the courts below denied him a fair trial in violation of the Fourteenth Amendment. *E.g., Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (1930); *Saunders* v. *Shaw,* 244 U. S. 317 (1917).

The harm caused the defendant by these erroneous evidentiary rulings was aggravated by the fact that he was being tried under a statute which presumes scienter. Obviously, there is no genuine scienter requirement when scienter is presumed and the defendant is not permitted to rebut the presumption.

C. The Jury Was Permitted to Find Petitioner Austin Guilty Even if He Established That He Believed, in Good Faith, That the Publications Were Not Obscene.

Notwithstanding a very clear request by Austin's attorney, the trial court refused to instruct the jury that it must acquit if it found that the defendant believed, in good faith, that the publications were not obscene (100-101, 109-111). This, by itself, is reversible error for

the simple reason that such a good faith belief is the very opposite of guilty knowledge. By denying this request, the instructions of the court, in direct contravention of the holding in *Smith* v. *California,* allowed a conviction in the absence of scienter.

D. There is No Evidence Which Could Support a Finding of Scienter.

The only evidence which has any conceivable bearing on the question of Austin's mental state is testimony that, in response to pressures exerted by a vigilante group, Austin had certain "girlie" magazines (including the two magazines here involved) stapled so that they could not be read in the store, placed these magazines behind the counter, and refused to sell them to persons under the age of twenty-one (21-26, 33-35, 41, 46-47). Guilty "knowledge" of obscenity cannot be found from this evidence.

Austin's steps to restrict the availability of these magazines were not taken in response to a suggestion that the magazines were obscene or illegal. The vigilantes whom he was trying to placate claimed only that some unspecified "girlie" magazines might be harmful to minors. The vigilantes did not seek complete suppression of all "girlie" magazines; they sought only to restrict distribution to minors (23-26, 33-36, 41).

Moreover, if vigilante pressures are sufficient to impute "knowledge" of obscenity, there is probably no bookseller in the nation to whom such "knowledge" cannot be imputed. It is commonly known that throughout the nation well organized groups of private censors are pressuring wholesalers and retailers to refuse to handle literature dealing with sex. The targets of these groups are, for the most part, constitutionally protected non-obscene materials. See Lockhart and McClure, "Censorship of Obscenity: The

Developing Constitutional Standards", 45 Minn. L. Rev. 5, 6-13 (1960). If vigilante activities prove guilty knowledge, booksellers will be compelled to submit completely to the vigilantes, and constitutionally protected literature will be unavailable to the public. Here, again, the ruling sought by Kentucky would make *Smith* v. *California* meaningless. Indeed, as noted above (pp. 6-7) evidence of vigilante activities must be treated as completely immaterial if the scienter requirements of *Smith* are to have any effect.

The *Austin* case demonstrates the danger posed to free speech by vigilante pressures. Petitioner Austin capitulated almost completely to the private censors in his community. Should the actions of such censors be sanctioned by the courts through holdings that such actions constitute evidence of scienter, few wholesalers or retailers could stand up to vigilantes at all. The vigilantes, with the aid of the courts and prosecutors, would then have won their battle to suppress non-obscene literature dealing with sex.

Finally, even if there were evidence from which guilty knowledge could be imputed (and there is no such evidence), the restrictions upon Mr. Austin's right to prove lack of scienter (see pp 12-14 above) compel a holding that scienter was not fairly proved.

CONCLUSION

While there may be circumstances which would warrant the imputation of guilty "knowledge", those circumstances are not present in either of these appeals. If guilty "knowledge" can be imputed on the records before this Court, there is practically no obscenity action in which a state could fail to prove scienter. Thus, the question before this court is not how *Smith* v. *California* should be applied. The question is whether *Smith* v. *California*

should be effectively overruled through the sanctioning of statutory and evidentiary loopholes which would, in effect, create an absolute liability for the sale of obscenity, irrespective of the seller's knowledge or state of mind.

The judgment in each case should be reversed.

Respectfully submitted,

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APPENDIX

Kentucky Revised Statutes § 436.100

Distribution of obscene literature. (1) Where the term "person" is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.

(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show, has in his possession with intent to sell, lend, give away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

(3) Any person who, with knowledge of the content or character, sells, lends, gives away, shows or offers to sell, lend, give away or show any obscene printed matter, picture or figure or image to a minor, shall be fined not less than one hundred dollars nor more than five hundred dol-

lars and imprisoned for not less than ten days nor more than six months or both so fined and imprisoned.

(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)

SUPREME COURT

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IN THE

Supreme Court of the United States

October Term, 1966

No. 3

ROBERT REDRUP,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1966

No. 3

ROBERT REDRUP,
Defendant-Petitioner,
against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF

Opinions Below

The trial court did not deliver an opinion. The Appellate Term of the New York Supreme Court, First Department, affirmed the conviction on December 17, 1964, without opinion. Leave to appeal to the Court of Appeals was denied on January 4, 1965, by Associate Judge STANLEY H. FULD without opinion.

Statement

On April 29, 1964, an information was filed against Redrup charging him, under Section 1141 of the N. Y. Penal Law, with two counts of selling obscene books, entitled *Lust Pool* and *Shame Agent,* the sale having been made to Patrolman Robert Greifenstein on April 10, 1964 (R.6).* Tried before a three-judge panel, the defendant was found guilty on each count on June 11, 1964 (R.23), and on July 28, 1964, received a suspended sentence (R.24).

On appeal, the Appellate Term of the New York Supreme Court, First Department, affirmed the judgment without opinion (R.27-8), and leave to appeal to the Court of Appeals was denied on January 4, 1965, by Associate Judge STANLEY H. FULD (R.28). Certiorari was allowed by this Court on April 25, 1966, limited to a question concerning *scienter.*

THE EVIDENCE

The People's Case

Robert Greifenstein, a New York City police patrolman, testified that on April 10, 1964, at about 5:50 p.m., he visited a newsstand located on the street level of a subway arcade at 263 West 42nd Street in New York County (R.10). Displayed among the books on the bookrack were two paperback volumes entitled *Lust Pool* and *Shame Agent.* Noticing these, the officer pointed to them and told the salesman, Robert Redrup, "*Lust Pool* and *Shame Agent*" (*id.*). The defendant then removed the two books from their rack and

* References, unless otherwise indicated, are to pages of the Transcript of Record in this Court.

placed them on the counter, while the officer handed Redrup a dollar bill. Redrup, however, told the customer that the books cost $1.80, and Greifenstein replied that he thought they were fifty cents each. The defendant then explained that they cost ninety cents apiece. When the officer pointed out to the salesman that *Shame Agent* had a price of seventy-five cents marked on the cover, Redrup responded, "Okay, give me a dollar sixty-five." The officer then gave him another dollar, and the defendant returned thirty-five cents in change, placed the books in a paper bag and handed it to Greifenstein (R.11).

After the purchase, Greifenstein identified himself as a police officer and showed a search warrant for the premises (*id.*). In response to questions, Redrup stated that he worked for a Mr. Milton Block for two years, earned $75 per week, and his duties alternated between the newsstand where the sale was made and the bookstore downstairs in the subway. While still at the newsstand, the officer asked the defendant, "Why do you sell this garbage?" Redrup answered,

> "'There is worse stuff than that around . . . I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black-and-white" (R.12).

The Defense

Robert Redrup, 36, the defendant, testified that he was employed by the owner of the newsstand and the arcade bookstore for the past two years, earning $75 per week. For the past eight months he worked in the store downstairs, and for the previous 16 months at the newsstand (R.

14, 17). The store and stand sell "all kinds of paperbacks," but mainly detective stories, westerns, and books similar to *Lust Pool* and *Shame Agent* (R.14, 20-21). On the day of arrest, Redup was at the newsstand for the hour between 5:30 and 6:30 p.m. "because the man was sick" (R.15). Twice previously he had "filled in" for an hour at the newsstand, the last occasion being two weeks before his arrest (R.15, 21).

When Greifenstein asked to buy the books, another clerk at the newsstand took them from the rack and handed them to the defendant. Redrup told the customer the price was $1.80 "because they charge 90 cents apiece for those books." But after some dispute as to the price, one book being marked "75¢," the other clerk told Redrup to "charge what it says," and the defendant accepted $1.65 from the officer (R.15-16, 18-19).

The policeman then identified himself and exhibited a search warrant (R.15). Redrup told the officer that he worked there for an hour on Friday nights, substituting for the sick sales clerk. Redrup did not recall telling the policeman that other books "were worse" than the ones sold, but stated that girlie magazines were sold at the stand. The defendant also testified that he had never seen the two books before the time of sale (R.16), although on cross-examination he answered that "I knew those books were sold there; I could see them" (R.20).

Question Presented

The question certified by this Court in the grant of certiorari, as framed in the petition therefor, is as follows:

Whether, consistent with the due process requirements of the Fourteenth Amendment and the constitutional standards for judging obscenity enunciated by the Supreme Court, a judgment of conviction can be rendered against an accused without proof in the record that the accused knew the contents of the material or believed that the material involved violated the law, and where books of a similar character have been held to be constitutionally protected by the courts of the State.

POINT I

The constitutional requirement of *scienter* in obscenity prosecutions is satisfied by proof that the defendant knew the facts concerning the contents of the piece in question.

In *Smith* v. *California* [361 U.S. 147 (1959)], this Court held that the Constitution prohibits a state from imposing criminal liability for the sale of obscene materials without proof of the mental element of *scienter*. About three months later, the New York State Court of Appeals, without opinion, reversed a conviction had under Section 1141 of the New York Penal Law. The memorandum accompanying the decision revealed that the reversal was for failure of proof of *scienter* as required by *Smith, supra* [*People* v. *Engel*, 7 N.Y.2d 1002 (1960)]. While New York's high court was not then dealing directly with the

question of the statute's constitutionality, the law was impliedly construed to require proof of *scienter*. One year after *Engel*, the Court of Appeals confronted the question directly. In *People* v. *Finkelstein* [9 N.Y.2d 342, 344 (1961)], the court wrote: "It is our firm opinion, on this our first opportunity to construe the statute, in this respect, that the definition of the crime is instinct with the idea of *scienter*." The constitutionality of Section 1141 was thereby preserved, and ever since the prosecution has borne the burden of proving the mental element of the crime in New York.

In *Smith* this Court expressly reserved for future consideration the question of "what sort of mental element" is meant by the term "*scienter*" as applied to obscenity prosecutions. Notwithstanding the reservation, however, the opinion of Mr. Justice BRENNAN, voicing the Court's decision in *Smith*, defined the term at one point as: "knowledge by appellant of the contents of the book" [361 U.S. at p. 149]. Indeed, throughout the majority and concurring opinions the word "contents" was used interchangeably or in combination with "nature" and "character" to describe the sort of knowledge constitutionally requisite. The question here presented suggests that there can be no valid conviction absent proof that the defendant "believed that the material involved violated the law."

The petitioner's brief is a general treatise on the measure of evidence necessary to satisfy the "strict standards" of proof beyond a reasonable doubt in a First Amendment case. It only touches in passing upon what seems to be the central issue of the case. However, the brief on behalf of the Council for Periodical Distributors Associations,

Inc., *amicus curiae* (hereafter "Distributors"), comes to grips with the troublesome question. Amicus states its proposal in the negative: that criminal liability is removed by a "good faith" and rationally grounded belief that the material is not obscene. But since the burden of proof would rest with the the prosecution to establish the negative of the negative, the proposed *scienter* standard might as well be expressed: the guilty defendant must believe that the material was obscene. The examples supplied (Distributors' brief, p. 7) of proof to satisfy the the amicus' test, convincingly demonstrate the affirmative burden he would impose upon the prosecution. Thus, the Distributors must be read to contend, as the petitioner himself appears to suggest, that the sort of knowledge required by the Constitution is not mere awareness of the operative facts, but cognition of a legal conclusion, indeed, the accurate prediction of the result of possible future litigation: the obscenity of the article. Not traditional usage, nor precedent, nor common sense and good reason accords with the interpretation advanced for the term *scienter*.

In *Rosen* v. *United States* [161 U. S. 29 (1896)] this Court specifically rejected a similar contention addressed to a Federal statute. There the defense requested a trial instruction of acquittal if a reasonable doubt existed that the defendant knew the mailed material to be obscene. In upholding the refusal to charge in this manner the Court, speaking through former Justice HARLAN, declared:

> "The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mails by one who knew or

had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. Congress did not intend that the question as to the character of the paper should depend upon the opinion or belief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails" [161 U.S. at 41].

Later attempts to interpret *scienter* as requiring knowledge by the defendant of obscenity have similarly failed. The courts consistently, and as recently as 1962, have applied the reasoning of *Rosen* to hold that knowledge or notice of the contents of the challenged work is sufficient.*

In the criminal law generally, the element of *scienter* is established by knowledge of the operable facts. That the

* *Price* v. *United States*, 165 U. S. 311 (1897); *Kahm* v. *United States*, 300 F. 2d 78, 86 (5th Cir. 1962), cert. denied 369 U. S. 859 (1962); *United States* v. *Oakley*, 290 F. 2d 517, 519 (6th Cir. 1961), cert. denied, 368 U. S. 888 (1961); *Schindler* v. *United States*, 208 F. 2d 289 (9th Cir. 1953); *People* v. *Wepplo*, 78 Cal. App. 2d 959, 178 P. 2d 853 (1947); *California* v. *Williamson*, 207 Cal. App. 2d 839, 845 (1962), cert. den. 377 U. S. 994 (1964); *Cincinnati* v. *King*, 168 N. E. 2d 633 (1960).

See also, *People* v. *Finkelstein*, 11 N. Y. 2d 300 (1962), cert. denied 371 U. S. 863 (1962); *State* v. *Hudson County News*, 41 N. J. 247, 196 A. 2d 225 (1963); *Alexander* v. *United States*, 271 F. 2d 140, 145 (8th Cir. 1959); *United States* v. *Hockman*, 277 F. 2d 631, 633 (7th Cir. 1960), cert. denied 364 U. S. 837 (1960); *Wisconsin* v. *Chobot*, 12 Wisc. 2d 110, 106 N. W. 2d 286, 292 (1960), appeal dismissed 368 U. S. 15 (1961); *California* v. *Harris*, 192 Cal. App. 2d 887, 893 (1961), rev'd on other gds., 366 P. 2d 305 (1961); *Connecticut* v. *Andrews*, 150 Conn. 103, 186 A. 2d 546, 552 (1962); *Connecticut* v. *Cercone*, 2 Conn. Cir. 144, 196 A. 2d 439, 444 (1963); *Nebraska* v. *Jungclaus*, 176 Neb. 641, 126 N. W. 2d 858, 862 (1964); *Chicago* v. *Doe*, 47 App. 2d 460, 197 N. E. 2d 711, 715 (1964); *Missouri* v. *Vollmer*, 389 S. W. 2d 20 (1965).

wrongdoer did not know that such facts amounted to a crime at law is neither a defense nor an excuse. And pornography has a purely factual aspect. For there is objectively perceivable material whose contents, subject matter, and treatment are susceptible of inspection. More specifically, a seller may be expected to learn the nature of the "dominant theme." The legal significance of these facts, however, is a far more subtle and complex issue beyond the layman's ordinary capacity to decide, involving "a question of constitutional judgment of the most sensitive kind" [*Roth* v. *United States,* 354 U. S. at pp. 497-498; *Jacobellis* v. *Ohio,* 378 U. S. at p. 188]. Combining these factors, courts have characterized obscenity as a mixed question of fact and constitutional law [*People* v. *Richmond County News,* 9 N. Y. 2d 578, 580-581 (1961)].

Petitioner contends, in essence, that because of the special constitutional protection of "speech," a seller's foreknowledge must cover both fact and law, and that he escapes culpability unless he is aware that the material he deals in would be classified obscene by a court. In the absence of a prior restraint upon the particular item, this would necessarily call for an assessment of the outcome of an adjudication all but impossible for even the most trained and knowledgeable lawyers to make.

But beyond this, such a conclusion is a logically indefensible as well as practically unenforceable criterion of culpability. Guilt cannot depend upon the putative offender's own appraisal of the legal significance of his conduct. Else a man could acquit himself by his own belief in

his innocence. "Rational grounds" for such belief, in most cases, abound. And, while obscenity is separated from constitutionally protected speech by a thin line, its limits require effective enforcement opportunities nonetheless. *Scienter* requirements must not be so broad as to allow the line to be covered over by self-serving protestation.

> "Accordingly, the proof of scienter that is required to make prosecutions for obscenity cannot be of a nature to nullify for all practical purposes the power of the State to deal with obscenity" [*Smith* v. *California*, 361 U. S. at p. 164, opinion of Justice FRANKFURTER].

Yet, admittedly, limiting knowledge to the facts alone may present a real dilemma for a distributor, for he may know the contents of a work, but not know it is obscene. Indeed, even after honest and good faith appraisal, he may still be liable to conviction if a court later disagrees, despite the fact that he intends to commit no crime by dissemination. Thus a man may not know he is a criminal until he is convicted, an outcome not immediately commending itself to common concepts of justice.

This consequence is traceable in good measure to the operation of the criminal law, which is confined to a *post facto* review of conduct. The practicalities of crime and enforcement do not lend themselves to prior advisory opinions. Consequently, a defendant is thrown upon his own resources to assess his conduct, and by choosing to act he must assume the risks if he is wrong.

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree" [*Nash* v. *United States*, 229 U. S. 373, 377 (1912)].

In *Smith* this Court expressed concern that forcing a distributor to run this risk might result in self-censorship producing an inhibitory effect on the dissemination of non-obscene material. While, as the Court also recognized, any form of criminal obscenity statute will inevitably have some such effect, the tendency to inhibit should substantially diminish as the character of the material recedes from the area of protected speech. Viewed in another light, this concern is actually induced by the necessarily blurred definition of obscenity at the borderline, another aspect of the issue of vagueness. In an effort to harmonize a man's before-the-fact assessment of his conduct, and the legal system's after-the-fact review, criminal statutes require "sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practice" [*Roth* v. *United States*, 354 U. S. at p. 491, *supra*]. Conversely, a statute is not void for vagueness by failing to define consequences with mathematical precision and certainty. For realistically, a residuum of doubt inevitably and unavoidably shrouds borderline conduct.

Realizing, however, that obscenity appraisals are extremely difficult in borderline situations, this Court left open in *Smith* "whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse" [361 U. S. at p. 154]. This "justification" is the nexus of Redrup's *scienter* defense, for appellant argues that he did not honestly believe the two books were obscene. He cites in support his statement to the police officer that *Lust Pool* and *Shame Agent* were no worse than "girlie" magazines also displayed for sale at the newsstand.

Nevertheless, while this claim is superficially appealing, appellant misconstrues the meaning of "honest mistake," for that defense, insofar as it should be available, cannot refer to the mistake of law which Redrup made, but must describe a mistake in factual evaluation. Certainly in *Ginzburg* v. *United States* [383 U. S. 463 (1966)] the defendant believed that his material was protected by prior Supreme Court rulings; he said so specifically in the advertisements which this Court accepted at face value [*id.* at p. 468, text and footnote 9]. Ginzburg's belief, while both honest and mistaken, did not prevent his conviction, for he knew precisely the contents of his publications. Indeed, his salacious descriptions contributed to their pornographic character.

Even more closely analogous to the case at bar is the decision of the Sixth Circuit in *United States* v. *Oakley* [290 F. 2d 517 (6th Cir. 1961)]. Rejecting a *scienter* claim founded upon the defendant's personal comparison of the obscene material he mailed with non-obscene matter currently available in the community, the court reasoned:

> "Should defendant be held to have meant no wrong? Defendant told of pictures seen by him while in the service. He introduced numerous publications and made reference to other media of information and entertainment currently available to the view of the public. He argues that his material was no worse than these. From his experience with these matters, he was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent. We need not here pass upon the relative merits, or demerits, of defendant's wares and what may be obtained elsewhere. We decline to hold that contemporary sophistication has

reached a point whereby to provide this defendant, or anyone else, with a license to prosecute the business of disseminating obscenity'' [290 F. 2d at p. 519].

Indeed, to permit an honest mistake as to the legal significance of material to control the judgment of a court is hardly different from resting the verdict upon the defendant's belief as to obscenity. Perhaps a theoretical distinction can be drawn but the line would certainly be erased in practice. An uncertain distributor could merely consult an attorney who would probably be uncertain also. Could the attorney's indecision then provide a seller of pornography with a complete defense against prosecution? Or could an attorney in collusion with the distributor immunize him by a slight pull of the bootstraps? With these and other anomalies, dangers and subterfuges undoubtedly in mind, the Circuit Court in *Schindler* v. *United States* [208 F. 2d 289 (9th Cir. 1953)] properly refused to receive evidence that a distributor was advised by his lawyer that dissemination of the material later deemed obscene in court was lawful.

In brief, to require proof that the defendant made no honest mistake in his legal appraisal of the material he sold makes little sense. On the other hand, it is entirely reasonable that a seller, acting in good faith, should be exonerated if an honest mistake prevented him from learning the facts about the character or content of his material. For he is then without the necessary basis upon which he can choose a course of action, and his failure to obtain the facts is excusable, much as a child's age or an insane man's mind inhibits rational choice.

In this regard, Justice FRANKFURTER, concurring in *Smith*, aptly observed that "the Court does not hold that a bookseller who insulates himself against knowledge about an offending book is thereby free to maintain an emporium for smut" [361 U. S. at p. 161]. For to purposefully refuse to learn the facts is not a good faith act, and thus cannot be the basis of an honest claim of ignorance. But "obviously," the Justice continued, "the Court is not holding that a bookseller must familiarize himself with the contents of every book in his shop" [*ibid.*]. How then is one to decide which publications must be examined, and which can be freely disseminated without further inquiry? There exist certain books which, because of their titles, cover drawings, cover "blurbs," exorbitant prices or unusual method of delivery, to name a few of the more common indicia, signal their pornographic character. Such clues put the seller on notice that the books may be obscene, and if he fails to take cognizance of the obvious, his negligence deprives him of a defense based on good faith ignorance.

However, it is entirely possible that a pornographic text does not flaunt its character openly. The *Memoirs of a Woman of Pleasure* suggestively advertised differs importantly from *Fanny Hill* sedately dressed [see, *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966)]. The seller might then reasonably mistake the volume for an innocent publication. He has little or no notice of the possible obscene nature of the text, and cannot be expected to make further inspection. In short, he will have no knowledge of the book's story, and there will be no particular reason for him to know about it. If he makes a mistake under such conditions, the error is understandable and he is deserving of acquittal for lack of *scienter*.

The facts of the instant case, notwithstanding the petitioner's argument, clearly evidence Redrup's knowledge of the facts sufficiently to satisfy the element of *scienter*. Although he was merely "filling in" for an hour in place of the regular clerk at the time of his arrest, the defendant had been employed in the store for a period of two years and had previously been stationed in that part of the store where the articles in question were displayed and sold. While the defendant may not have read the books in question, or been responsible for their inclusion in the store's inventory, there is little doubt upon this record that he was familiar with their contents. Their titles, *Lust Pool* and *Shame Agent*, obscure publisher, "Corinth Publications," and cover "blurbs" ("they spent a summer of sin beside this LUST POOL," and "He sold public relations—by the sinload!")* all unmistakeably denoted the genre of the writing within. Such "pulp" sex novels are commonplace and anyone working for two years in a bookstore in the Forty-second Street area of Manhattan could hardly escape some acquaintance with this sort of publication. They are virtually interchangeable, varying only in their story lines which serve to connect stereotyped sexual episodes. Indeed, the defendant admitted some knowledge of the contents of the books in question

* Printed on the outside of the back cover of *Lust Pool*, the following appears, here reproduced in full:

> "TOO MANY WOMEN! Too many loves. Everywhere Marshall Jones turns he finds another shameless minx, arms held wide, welcoming him to share her most depraved hungers. They find him from humble bars to palatial mansions * * * from gaudy sin dens called strip joints to the most degrading workshops of professional hustlers. And Big Tom, the vice lord, owns them all, lock, stock, and loving * * * only Marshall Jones proved to be too much to keep in the lust pool * * *."

when he compared them to "girlie" magazines also displayed for sale in the premises. Such awareness of the facts as would permit the undenied comparison he made for the officer, constitutes *scienter* and negates the claim of "honest mistake" as that term is properly understood.

Finally, if wisdom decrees that liability should be excused by a true error of judgment concerning the pornographic character of the work, such a uniquely wrought exemption should not be forced within the bounds of *scienter*. The old familiar concept of *scienter* must remain simply knowledge of the facts, an unsophisticated creature. And *Smith* must be taken to enjoin upon the prosecution only the burden of proof of such knowledge, a burden which is reasonable, as well as just, to demand. The creation of such a special excuse, then, is no federal concern. If a state should choose—perhaps wisely—to excuse from liability in this sensitive and difficult area the man who is honestly mistaken in his good faith effort to judge the pornographic character of a piece, it might be appropriate to create an "affirmative defense" for the purpose. As an affirmative defense, the burden would be upon the defendant to establish both his state of mind and the considerations leading to his belief, matters particularly within his ability to prove, as they are beyond the state's capacity to disprove.

The State of New York has quite recently accepted the principle of the affirmative defense as a burden of the defendant. In the Revised Penal Law, enacted last year effective September 1, 1967, the new defense has been used, sparingly, for such special excuses peculiarly stemming

from the defendant's own state of mind and consequently within his ability to prove. Thus, for example, in an obscenity case it is an affirmative defense that the audience had a scientific or similar reason for viewing the material (Rev. Penal L., §235.15). In a larceny prosecution, the defense is available to show that the property was appropriated under a good faith claim of right (*id.* §155.15). [The affirmative defense is defined in Section 25.00 (2) of the Revised Penal Law.]

The policy of the jurisdiction affected, not the Constitution, must approve the wisdom of providing the sort of excuse urged here by the amicus, and decide the most appropriate way of incorporating it into existing law. Whether the evil of self-censorship will be diminished, while preserving the ability to enforce obscenity laws is a question for local resolution. The constitutional mandate of free dissemination of ideas is satisfied by requiring the state to prove that the accused bookseller was not ignorant of the facts upon which his liability is predicated.

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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September, 1966

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IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threat-

ens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

Robert Redrup v. The People of the State of New York, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On April 10, 1964, at about 5:50 p.m. patrolman Robert Greifenstein approached the newsstand at 263 West 42nd Street, which is on the street level of the subway arcade and saw displayed in a bookrack the books: "Lust Pool" and "Shame Agent". The officer pointed to the bookrack and told the clerk, petitioner Robert Redrup herein, "Lust Pool and Shame Agent". [R. 10.] Petitioner Redrup removed the two books from the bookrack and placed them on the counter saying, "That will be $1.80." Patrolman Greifenstein told him, "I am sorry; I thought they were 50¢ each." Petitioner replied, "These cost more; they are 90¢ each." The officer gave petitioner $2.00 and received 35¢ in change. Petitioner

Redrup placed the two books in a brown paper bag and handed the bag to the patrolman. [R. 11.]

The front cover of "Lust Pool" [People's Ex. 2] shows a nude female sitting at the edge of a swimming pool, facing the viewer. Her legs are crossed in front of her, yogi-fashion, and her arms are extended in front, so as to cover her vaginal area. In the pool in the background, a male is looking in her direction. The front cover reads "They spent a summer of sin beside this — Lust Pool by J. P. X. Williams, a Pillar Book 75¢." The rear cover reads "Too Many Women!! Too many loves. Everywhere Marshall Jones turns he finds another shameless minx, arms held wide, welcoming him to share her most depraved hunger. They find him from humble bars to palatial mansions . . . from gaudy sin dens, called strip joints to the most degrading workshops of professional hustlers. And Big Tom, the Vice Lord, owns them all, lock, stock and loving. . . . Only Marshall Jones proved to be too much to keep in the lust pool. . . ." The binding edge reads "Lust Pool 75¢ PB841."

The front cover of Shame Agent [People's Ex. 1] shows the rear view of a nude female standing with her back toward the viewer. A portion of a towel covers the rear portion of her body from her buttocks to her shoulders. The illusion is that the front of her body is uncovered. In the background, a male figure appears to be looking in the direction of the viewer (and the front view of the nude female). The front cover reads, "He sold public relations — by the sin load. — Shame Agent. by Don Bellmore, an Ember Book 75¢." The binding edge reads "Shame Agent price 75¢ EB943." The rear cover reads, "Press Agent Passion. Paul Clarke was the ablest representative the firm of Oscar Clem-

ent's public relations had. Almost every woman in town would testify to that . . . especially Clarke's vixen of a secretary, Kathy. And every one who knew Paul was demanding his attentions in exchange for any little favor he might do to get their names before the public . . . being very careful, of course, to screen out all the shame and degradation of their truer activities. . . ."

The police officer identified himself and showed the defendant a search warrant which he executed, seizing six additional copies of Lust Pool. [R. 11, 3.]

Petitioner told the officer he had worked for Milton Block for approximately two years, and alternated between the newsstand where the arrest was made and the bookstore down the stairs in the subway arcade. Patrolman Greifenstein asked the petitioner, "Why do you sell this garbage?" The petitioner stated, "There is worse stuff than that around; I think these books here are worse" referring to girlie magazines that were on top of the counter with the nude and semi-nude in color and black and white. [R. 12.]

On April 11, 1964, patrolman Greifenstein filed a complaint alleging a violation of New York Penal Law, Section 1141 in two counts naming the publications "Lust Pool" and "Shame Agent". [R. 2, 3.] On April 29, 1964, a two-count information [R. 6] was filed in the Criminal Court of the City of New York, County of New York, charging petitioner with violations of New York Penal Law, Section 1141, Subdivision (1). Each count of the information alleged that petitioner had sold an obscene book in violation of the statute. [R. 6.] The cause came on for trial before a three-judge court in the Criminal Court of the City of New York, County of New York on June 4, 1964. [R. 9.] (Impellitteri, Castaldi and Rohan.)

People of the State of New York; Case in Chief.

Robert Greifenstein testified that he was a patrolman for the City of New York and that on April 10, 1964, at about 5:50 p.m. he visited the newsstand at 263 West 42nd Street[1] on the street level of the subway arcade of the City. As he approached the newsstand he saw displayed in a bookrack, two books "Lust Pool" and "Shame Agent". He stated that he pointed to the bookrack and said to the petitioner, the clerk at the newsstand, "Lust Pool and Shame Agent". [R. 10.] The petitioner removed the two books from the bookrack and placed them on the counter whereupon the patrolman handed the petitioner a dollar bill. Petitioner stated to the patrolman, "That will be $1.80.", whereupon the patrolman said, "I am sorry, I thought they were 50¢ each." Petitioner stated to the patrolman, "These cost more; they're 90¢ each." The patrolman pointed to the copy of "Shame Agent" and stated that "Shame Agent" was marked 75¢, whereupon the petitioner said, "O.K.

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[1]In *People v. Weingarten*, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (June 13, 1966) Trial Judge Amos S. Basel found the defendant guilty of selling an obscene paperback book "Flesh Worshippers" at *251 West 42nd Street*. The judge noted at page 640 that "Finkelstein who was convicted owned a bookshop at *251 West 42nd St.*" Two of the shops involved in *Mishkin v. N.Y.*, 383 U.S. 502 (Mar. 21, 1966) were located at *254 West 42nd Street* (Publisher's Outlet) and *228 W. 42nd Street* (Midget Book Shop). It would appear that a trial judge should be able to take judicial notice of those activities which have acquired a local, even national reputation. See N.Y. Journal-American, Oct. 29, 1963 "The lights were bright early today on *42nd Street between Broadway and 6th Ave.*—one of the seediest strips of real estate in town. The assignment was to see what kind of smut material could be found in the area. The material was there—and so were the stores. They're not hard to find. There were six on 42nd street strip—two more in the subway—and many were still open at 2:30 A.M. Most of the places looked the same. They were sooty and there was provocative calendar art on the walls—nudes and semi-nudes—with salacious type book jackets and titles lining the stalls. . . ."

give me $1.65." The patrolman handed him a second dollar bill and received 35¢ in change. Petitioner placed the two books in a brown paper bag and handed the bag to the patrolman. The patrolman showed the petitioner a search warrant and executed the same, seizing 6 copies of "Lust Pool." [R. 3, 10-11.] "Shame Agent", "Lust Pool" and the paper bag were received in evidence as Exhibits 1-3.[2]

The patrolman testified that he had the following conversation with the petitioner: "I asked petitioner who he worked for; he said that he worked for Milton Block. I asked him how long he worked for Mr. Block; he said for approximately 2 years; he alternated[3] between the newsstand where the arrest was made and the bookstore which was down the stairs in the subway itself. He stated that he made $75 a week. I asked the defendant while we were in the newsstand 'Why do you sell this garbage'. The defendant stated, 'There is worse stuff than that around;'[4] he says, 'I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black and white." [R. 12.]

On cross-examination by Mr. Fraenkel, the defense attorney, patrolman Greifenstein stated that he did not make a note of the conversation after the arrest, nor did

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[2]See Appendix A. The covers and frontispiece are "autoptical evidence" of pandering, *i.e.*, "purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers. . . :" *Womack v. United States*, 294 F.2d 204, 205; *Ginzburg v. United States*, 16 L. Ed. 2d 31, 36.

[3]Petitioner's conversation with the Police Officer conflicted with the testimony given by him in his defense. "Tom" and "John," the "Alibi" witnesses were not produced.

[4]By his own statement petitioner had "objective" knowledge of the *character* of the subject matter, a fact also established by the sales transaction itself.

he have such information in the complaint that he filed. Asked, "You're assigned to this field of so-called obscene books, are you not" the officer stated "I am not assigned to it specifically, only when I receive a complaint." Asked how many arrests he had made since April 10,[5] the patrolman said, "I haven't made many for 1141 since April 10th" and that he had made approximately 20 for other type arrests. Asked whether he made notes of conversations with the persons arrested on those 20 occasions he said, "yes", but that he had not made notes in this instance. [R. 12-13.]

The People of the State of New York rested their case.

The defense attorney moved to dismiss each count of the information on the following grounds: (1) the People had failed to prove scienter; (2) the People had failed to prove community standards, and (3) neither book was obscene. The court reserved decision on the motion. [R. 13.]

Robert Redrup: The Defense.

The defendant Robert Redrup testified that he had been employed at the place of business involved for two years, and that his principal duty was working downstairs in the bookstore. He stated that the bookstore was "down in the arcade of the IND Subway, Eighth Avenue" and was about 20 feet by 12 feet. [R. 14.] He stated that the bookstore sold "fiction, non-fiction, historical, philosophical . . .". Judge Impellitteri remarked, "Will you keep up your voice? We have to hear you."[6]

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[5]The interval between arrest and trial was only eight weeks, a duration not likely to cause Patrolman Greifenstein's memory to become dull.

[6]On three occasions during the short trial, petitioner was asked to keep his voice up [R. 15, 16, 17.] It was up to the

The petitioner continued, "historical, philosophical, mythology, popular novels, mysteries, western." He stated that there was a newsstand connected with that bookstore under the same ownership, located up on the street level at 263 West 42nd Street.

Asked by the defense counsel, "How much of your time is spent at that newsstand" he replied, "One hour, 5:30 to 6:30", and ". . . it was just in that period because a man was sick, I had to go up there from 5:30 to 6:30 when the other man came in, and it was just on Fridays, and it only had been for that week and not for the week before, but two weeks before that." He stated that he had been there for about an hour on one earlier occasion. [R. 15.]

Asked by the defense counsel what his conversation with Patrolman Greifenstein was, he stated that the police officer asked him for the books and that he asked the other man, "John", if he had them in the place [R. 15], and that "John" looked and got them down and handed them to the petitioner. [R. 15.] He said that the police officer asked him how much.

Petitioner was asked to "speak up, please" whereupon the petitioner said, "I told him '$1.80,[7] and then there was a question of a price because one was marked .75 on the binding, and I asked John about it and he said 'Charge what it says' I told him, all right a dollar sixty-five' ($1.65). He paid me, and I gave him the change." [R. 16.]

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three trial judges to evaluate the defendant's manner of testifying—a factor which cannot be reproduced in a trial transcript for review by an appellate court.

[7]The inflated price is a "trade mark" in the industry, both books were marked to retail at $.75.

The petitioner was asked to answer the following questions regarding his conversation with officer Greifenstein, [R. 16]:

"Q. Did he ask you anything about how long you have been employed there? A. After, yes.

Q. Tell us about that conversation. A. I told him I was only up here for an hour on Friday night, and it was only for this particular period because a man was sick, that he couldn't be there, so I filled in for that hour.

Q. You heard the officer testify that you had said there were worse books than these here; was anything like that said? A. I don't recollect anything like that going between us in conversation.[8]

Q. Was anything said by you with reference to certain girlie magazines that were on the counter. A. No."

Petitioner stated that he had never seen either of the two books before that time. [R. 16.]

On cross-examination petitioner was asked the following, regarding his previous employment at the newsstand [R. 17]:

"Q. And on how many occasions had you worked at the newsstand where you were arrested? A. Previously?

Q. Previously to the time you were arrested. A. For the remaining period of the two years—16 months."

Judge Impellitteri remarked, "Will you keep up your voice?" The petitioner continued:

"Sixteen months; the remainder of the two years I worked upstairs at the newsstand."

[8]Petitioner's memory was dim only where it counted.

Petitioner was asked,

"Your salary was $75 a week? A. Yes it is.

Q. Did you tell the officer it was $75 a week? A. Yes I did."

The petitioner was asked the following questions regarding the "sick man" referred to on direct examination [R. 17]:

"Q. You say another man was sick and that's why you were helping out in the newsstand? A. That is correct.

Q. What is his name? A. Tom Leonard.

Q. And how long had he been sick? A. He was working, but he couldn't work at the newsstand; in other words, he had a rupture and he couldn't work up there in this period because he couldn't lift heavy newspaper bundles.

Q. Between 5:30 and 6? A. No, he was working downstairs.

Q. He couldn't work at the newsstand between 5:30 and 6:30? A. Right.

Q. So he went down to the bookstore? A. He couldn't work at the newsstand at all, so because of our schedule the way it was, the man who was going to take his place at the newsstand came in at 6:30, so what we did was he came in 5:30, relieved me at the bookstore that Friday night. I went up from 5:30 to 6:30 until the other man came. When the other man came, incidentally, while the police officers were there."

The petitioner was asked if Mr. Leonard was in court today and the petitioner replied, "No he isn't." [R. 18, 19.][9]

[9]Petitioner's "Alibi" witnesses were not brought into court to give their testimony.

The following questions were asked regarding "John":

"Q. You say. there was another gentleman named John who was in the newsstand with you. A. Yes, right.

Q. Was he working there also? A. Yes.

Q. Do two men usually handle that newsstand? A. At that time, yes.

Q. And was he also selling magazines and newspapers and what not? A. He was selling—he was over on the side where magazines were, and I was at the cash box selling whatever people bought, newspapers predominantly.

Q. You say when the Police Officer asked by name for the two books, you in turn questioned John? A. That's right.

Q. And did he show you where the two books were? A. He went and got them.

Q. He got them? A. That's right.

Q. And he handed them to you. A. I believe so, yes." [R. 18.]

"Q. Well, did he hand them to the Police Officer directly, or did he hand them to you? A. I am not positive on that point whether he handed them to me or to the Police Officer.

Q. Is it possible he put them on the stand himself, on the counter? A. It is possible, yes.

Q. And then he went back to his original post on the other side of the stand? A. Well, it is one stand, yes right there." and [R. 20]

"Q. Was John present when the arrest was made? A. Yes he was.

Q. Did the Police Officer arrest him? A. No he did not.

Q. Did he say anything to John? A. He said he is going to take one of us in.

Q. John said that? A. No, no.

Q. The police officer said that? A. Yes."

And [R. 21]:

"Q. Tell me, is John here today?[10] A. No, he isn't.

Q. Have you spoken to your employer Mr. Block about this case? A. He knows about it, yes.

Q. Have you spoken about it—did you tell him you were arrested? A. Sure, definitely."

The petitioner was asked the following questions concerning his conversation with patrolman Greifenstein as to the price of the paperbacks:

"Q. And you said '$1.80' right? A. Yes.

"Q. How did you arrive at the figure $1.80? A. Because they charge 90¢ apiece for those books.

Q. Didn't you look at the covers? A. Not usually, no.

Q. Did you look at the covers in this case? A. No, not until after there was some question.

Q. You just said a dollar eighty? A. Yes.

Q. Off the top of your hat? A. Yes, because there is a sign, 90¢ apiece.

Q. Look at People's Exhibit 2, 'Lust Pool', tell me if there is a figure on that? A. No, no figure.

Q. No figure at all? A. No, not there.

Q. And look at 'Shame Agent' and tell me what figure is on that? A. 75¢.

Q. 75¢? and you charged $1.80? A. No.

Q. You asked a dollar eighty originally. A. Originally, yes, I asked a dollar eighty.

Q. Then you turned to John, is that right? A. Right, and I asked him 'what about this' it wasn't crossed off, and he said, 'Charge what it says' and I told the officer then, 'a dollar sixty-five.' "

The petitioner was asked the following questions concerning the contents in the material offered for sale [R. 20-21]:

"Q. What type literature is sold in the newsstand where you worked that particular day where you were arrested? A. Magazines, papers, pocketbooks.

Q. Were any girlie magazines on the counter? A. Girlie magazines, yes.

Q. There were? A. Yes.

Q. Tell me, do you sell philosophical works in that newsstand? A. They don't handle that type pocketbook.

Q. Do you handle historical novels? A. No.

Q. Primarily detective stories, isn't that right, westerns and books of this type, isn't that what you sell in that newsstand? A. They sell Time magazine, Life, the usual magazines that newsstands sell, sport magazines, racing magazines.

Q. But you also know that books along the style of 'Lust Pool' were sold in that stand, didn't you, when you took over? A. I knew those books were sold there; I could see them.

Q. Generally, you knew what was sold in that newsstand, the type literature? A. No.

Q. Well, you knew philosophical works weren't sold in that newsstand? A. Of course.

Q. Did you sell any books by Rousseau at that newsstand? A. No.

Q. Do you sell any books by Descartes at that newsstand? A. Not familiar with the title.

Q. Do you sell any books by Winston Churchill in that newsstand? A. Not unless they're in magazine articles.

Q. I am talking about pocketbooks. A. No."

The defendant rested his case.

The People of the State of New York rested their case.

The defense attorney renewed his motion for a judgment of acquittal on the ground that the People had failed to prove the defendant's guilt beyond a reasonable doubt. The Court reserved decision and set the case down for decision on the 11th of June. [R. 22.]

On June 11, 1964, petitioner was convicted by the 3-judge court on both counts of violating New York Penal Law Section 1141. [R. 23.] On July 28, 1964, petitioner received a suspended sentence. [R. 24.] On December 17, 1964, the Appellate Term of the Supreme Court, First Department (Gold, Capozzoli, Hofstadter) affirmed the judgment without opinion. [R. 27.] Application for leave to appeal to the Court of Appeals of New York was denied without opinion on January 4, 1965, by Associate Justice Stanley H. Fuld. [R. 28.]

Summary.

Petitioner's argument that this Court's decision in *Smith v. California* imposes a specific intent requirement misreads *Smith* and disregards the subsequent expressions in *Mishkin v. New York.*

To insure cohesiveness, a frame of reference must be drawn—that of the defendant's state of mind. The state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact has five classes or degrees of "subjective" knowledge. Three are generally regarded as subjective knowledge and the last two, "objective" knowledge.

The scienter requirement came into the law in the *Smith* decision. The Court's language, properly interpreted, indicated that subjective knowledge was not a requirement. This court's language and reference to the California scienter requirement in *California v. Alberts,* seemed to indicate that "awareness of the contents and character" was the test, with an objective factor somewhere between ordinary negligence and recklessness.

The *Mishkin* case established "recklessness" as an acceptable scienter requirement, drawing a comparison between the Model Penal Code scienter version and the New York statute. That case clearly established the principle that there is no constitutional requirement which establishes "subjective" knowledge as the People's burden of proof.

The front and rear covers of Exhibits 1 and 2 are autoptical evidence of obscenity. Petitioner, being aware of their character should have known there was a high probability that they were hard core pornography, as their contents subsequently reveal them to be. Petitioner knew their sales price was inflated. He was not

new to the trade, having worked for two years as a retail book seller clerk on 42nd Street in the midst of the "dirty book" trade. The reputation of this class of book should have been recognized. Contrary to petitioner's assertion in his jurisdictional statement, similar books have unanimously been held to be obscene by the appellate courts which have considered them. The similarity in the format of such books and their patent offensiveness can be seen at a glance.

In the seven years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and substantially similar circumstantial evidence.

In reviewing this state court judgment, certain standards and criteria should be applied.

The determination of obscenity is primarily a question of fact, the definition itself being phrased as a jury question. The *Roth* court did nothing more than update prior rules on obscenity.

While obscenity is primarily a question of fact, the court also has its proper role, *i.e.*, to ascertain that the fact finder does not overstep the boundary between a court and a jury question.

In weighing the balance, amicus underscores the relative right of the government to regulate matters relating to sexual morality. The public interest in good public morality relating to the sex function is paramount.

The United States Supreme Court must, in cases where the line is drawn, examine for itself the statements in issue and the circumstances under which they were made to see whether constitutional rights are abridged. We believe the Court's function simply to be that of ascertaining whether a jury question has been presented.

The Court must ask itself pragmatically, "Is this a case of 'speaking'—or of 'pandering' "? Where hard core pornography is concerned, there is no issue of "free speech" and the "sufficient evidence" standard should suffice in determining whether the *mens rea* requirement has been met.

Under our analysis the evidence "amply" supports the trial court's findings that the "scienter" requirement had been met.

ARGUMENT.

I.

THE JUDGMENT OF CONVICTION HEREIN DOES NOT VIOLATE ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS.

A. Proof of Specific Intent and "Subjective" Knowledge Is Not Constitutionally Compelled by Smith v. California, nor Is It Required by New York Penal Law 1141. Mishkin v. N. Y. Instructs That "Objective" Knowledge of the Contents and Character of the Materials, Being Synonymous With Reckless Conduct, Meets the Smith Requirements.

Petitioner argues in his brief that this Court's decision in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959) imposes a constitutional requirement ". . . that the State bear the burden of persuasion to show that an accused *knew* that the material involved was obscene *and,* with such guilty knowledge, disseminated the material *with the intent of appealing to prurient interest.*" (Our emphasis.) (Pet. Br. pp. 7, 14.) Such an interpretation misreads the *Smith* case and totally disregards the subsequent expressions of this Court in *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (March 21, 1966). This Court has already established that "subjective" knowledge is not the prosecutor's burden of proof under the constitutional limitation.

It is important at the outset of these arguments that a frame of reference be drawn to insure cohesiveness. The proper frame of reference is the one under investigation—the defendant's state of mind.

1. An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

The prosecution's concern is the state of mind that must be proved as to any defendant, as expressed in the scienter provision of the Penal Statute.

Consider the state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact. Degrees of "subjective" knowledge are listed in chronological order.

(1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);

(2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowedge);

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact—criminal negligence);

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact—or only slight negligence).

Addressing himself to the above range in attitudes, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L. Rev. 905 (1939); Perkins on Criminal Law, p. 684.) Only in the

most theoretical discussions would it be questioned that one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds, unless (1) the particular offense does not require *mens rea* for conviction, *i.e.,* traffic offense, or (2) the deeds even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age.

Class (2) is regarded as "knowledge" as that word is used in regard to *mens rea.* The distinction between class 2 and class 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Class (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard,

and is treated as having "knowledge" of the facts as they are ultimately discovered to be.

Awareness of fault is the characteristic which distinguishes class (3) from class (4). In the latter—bona fide belief contrary to fact, not based upon reasonable grounds, there is no awareness of fault—the belief is entertained in good faith but was acquired as a result of gross negligence.

Classes (1), (2) and (3) are distinguishable from classes (4) and (5) in that in the latter, the subjective belief is actually contrary to the fact, one results from gross negligence and the other from slight negligence or no negligence.

Professor Perkins diagrams the meaning of "knowledge" as a *mens rea* requirement as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

What of "knowledge"

(4) Bona-fide belief contrary to fact resulting from criminal negligence.

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (or resulting from only slight negligence).

2. The Scope of the "Mental Element" Established in Smith v. California.

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith v. California, supra.*

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. The State statute required "scienter", *Alberts v. California,* 354 U.S. 476, 479 (June 24, 1957); the city ordinance did not. Smith was charged only with a violation of the city ordinance.

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the *Smith* case. If the *Smith* judgment were

reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? This Court in its opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to *Amicus* seemed to be rather clear guidelines, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents or falsely deny reason to suspect their obscenity*. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law.' 68 Harvard Law Review 1, cf. *American Communications Association v. Douds*, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The *Smith* Court at page 152, footnote 9, also pointed to the scienter requirement of the California Obscenity Statute considered in *California v. Alberts (Roth-*

Alberts), 354 U.S. 495, 1 L. Ed. 2d 1498, 77 S. Ct. 1314 (1957) and sustained in that case:

> "The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and *was of course sustained by us in Roth v. U.S.*" (Our emphasis.)

An examination of the scienter burden imposed by the California statute and approved by the *Roth-Alberts* court should have silenced all argument on whether the constitutional requirement included a specific intent and proof of "subjective" knowledge, *i.e.*, classes 1, 2 and 3, *supra*. The judicial construction given by the California courts to the California statute which was before this Court in the *Smith* case appears in *California v. Smith*, 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958):

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Under the principle that this Court must accept a state court's construction of a statute and proceed to test its validity on that basis, *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*,

360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the test imposed therein. The prosecutor's burden under *California v. Alberts* was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials." There is little doubt that "subjective" knowledge is *not* a requirement under this California test. "Objective" knowledge is sufficient — the measuring rod was the reasonable and prudent person, not the defendant. A reasonable classification of the prosecutor's burden in the *Alberts* case would certainly include class (4) *supra.*

It thus appeared that, after Smith, specific intent and "subjective" knowledge was definitely not a limiting requirement. This Court's approval of the language "in proving his awareness of its contents" and its apparent approval of the scienter provision as construed by the California courts in *California v. Alberts, supra,* which employed the "reasonable and prudent man" test were strong support for the proposition that the prosecutor did not have the burden of proving "subjective" knowledge on the part of the defendant as a constitutional limitation. This proposition was confirmed by this Court's decision in *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, approving the burden of proof established in the New York statute, as interpreted by the New York Court of Appeals.

3. Mishkin v. N.Y. Holds Awareness of Content and Character of Material, Being Synonymous With Reckless, Meets Smith Requirements.

Mishkin's argument before this Court had two prongs.[10] (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and 2) that the people's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

> "There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."
>
> "It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."
>
> ". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden. . . ."

This was also the same argument that had been made and rejected in another retailer case *New York v. Finkelstein*, 11 N.Y. 2d 300, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L.

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[10]The only legitimate issue open to petitioner herein, is that which Mishkin urged in his second contention, *i.e.*, that the People's evidence had not met the burden of proof under the statute. The first issue was resolved otherwise in the *Mishkin* case. Petitioner however has not seen fit to so limit himself, and has included in the one argument his contentions that the People's burden is subjective knowledge.

Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted"[11] the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

In replying to Mishkin's contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases this Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material",[12] the other of "knowledge of the contents."[13]

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner *aware of the character of the material* they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised." voiced in the first *Finkelstein* case. The New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance.

In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), 1962

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[11] *Mishkin v. N.Y.*, 16 L. Ed. 2d 56, 62.

[12] *People v. Finkelstein*, 9 N.Y. 2d 342, 344, 345, 174 N.E. 2d 470, 472 (1961).

[13] *People v. Finkelstein*, 11 N.Y. 2d 300, 304, 183 N.E. 2d 661, 663 (1962), cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which were described as expressing a "similar" requirement. Section 215.4(2) of the Model Penal Code (1962) cited by Justice Brennan provides that: ". . . a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," Section 2.02 (2)(c) of the Model Penal Code (1962) defines "recklessly" as:

> (c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and decree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. . . ."

A person would be guilty under the "recklessly" standard of the Model Penal Code not only where he purposely avoided making a judgment on the material (class 3, *supra*), which Professor Perkins indicates is customarily regarded as "knowledge", but also where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief—"objective" knowledge (class 4, *supra*). It therefore clearly is the law that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof, nor is it required by New York Penal Law 1141 under which Petitioner stands convicted.

B. There Is Ample Evidence to Support the Trial Court's Findings That Petitioner Had Knowledge (Objective) of the Contents and Character of the Materials.

The front and rear covers of Exhibits 1 and 2 are "conclusive autoptical proof of obscenity and filth." See Appendix A containing reproductions thereof. As noted by Judge Prettyman in *Womack v. U. S.*, 294 F. 2d 204, 205, cert. den. 365 U.S. 859.

> "Mr. Wigmore says: 'All evidential sources . . . are divided into three classes, namely, testimonial, circumstantial, and autoptical.' Concerning the latter he says: 'A fact is said to be evidence autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact."
>
> "The photographs which are exhibits in this case are conclusive autoptical proof of obscenity and filth . . ."

Petitioner was well aware of the character of the publication he was selling and should have known there was a high probability that they were hard core pornography, as their contents proved them to be. See Appendix B.

Petitioner himself admitted that he had objective knowledge of the character of the books, when he stated on cross-examination [R. 20] "I knew those books were sold there; I could see them." His statement at the time of the arrest, as related by Patrolman Greifenstein that "I think these books here are worse", referring to the girlie magazines on the counter, con-

firms what should have been obvious to any seller viewing the covers of the paperbacks at the time of the sale.

Petitioner knew that the books were being sold at a premium price, a trademark characteristic of this type of publication. *Amicus* can think of no other publication which can boast of a mark up of 20% from the regular retail price.

Petitioner was not a beginner in this trade. By his own testimony he had worked for Mr. Block for two years as a clerk in the retail book store business on 42nd Street in the midst of the "dirty book" trade. The reputation of Nightstand Books, Ember Books, Leisure Books, Pillar Books, Sundown Readers, Midnight Readers, Evening Readers are well known — notoriously known, to the book sellers on 42nd Street. Contrary to the petitioner's assertion in his Jurisdictional Statement [R. 30], books of a similar character (produced by the same publisher using the same format) have unanimously been held *not* to be constitutionally protected by the New York Court of Appeal and the highest courts of those state and federal courts which have considered the matter.

Similar books from the same publishing firm have been held: (1) to be hard-core pornography by the New York Court of Appeal under the New York obscenity statute. *Keney v. N.Y.*, In the Supreme Court of the United States, October Term 1966, No. 2 (Lust School, Lust Web, Sin Servant); *N.Y. v. Matherson,* 16 N.Y. 2d 509 (Lust Team); *Fried v. N.Y.*, 238 N.Y.S. 2d 742, cert. den. 378 U.S. 578 (College for Sinners); (2) to be hard-core pornography by the Supreme Court of Kansas under the Kansas obscenity statute. *A Quantity*

of Books v. Kansas, 19 Kans. 13, 379 P. 2d 254, reversed on procedural grounds 378 U.S. 205 (Born for Sin, No Longer A Virgin, Sin Girls, Sin Hotel, Miami Call Girl, Lesbian Love, Sex Jungle, The Lustful Ones, The Wife Swappers, Sex Model, The Lecher, Lust Goddess, Sin Camp, $20.00 Lust, Convention Girl, The Isle of Sin, Orgy Town, Sex Spy, Trailer Trollop, Flesh Is My Undoing, Sex Circus, Malay Mistress, The Sinning Season, Sin Song, Passion Slaves, The Sinful Ones, Lover, Passion Trap, Sin Cruise, Seeds of Sin); *Kansas v. A Quantity of Books,* 197 Kans. 306 (July 14, 1966) (Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinner's Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger); (3) to be obscene by the Circuit Court of Appeal for the Second Circuit under the federal obscenity statute, *Books Inc. v. U. S.* .... F. 2d .... (April 12, 1966), (Lust Job); (4) to be obscene by the Illinois Supreme Court under the Illinois obscenity statute. *Illinois v. June Sikora,* 204 N.E. 2d 768 (Jan. 21, 1965), (Crossroads of Lust, Passion Bride, Lust Campus). See also *Illinois v. Pascarello,* unreported X64-2122, 2123, a jury verdict holding "Sin Bin" and "Shame Hunger" obscene; (5) to be obscene by the Georgia Supreme Court under the Georgia obscenity statute. *Corinth Pubs. Inc. v. Wesberry,* 146 S.E. 2d 764 (Dec. 18, 1965), (Sin Whisper); (6) to be obscene by the Appellate Division of the Circuit Court of Connecticut under the Connecticut obscenity statute. *Conn v. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715, 716 (Wild Flesh, The Orgy Boys). The similarity in the trademark of such books and their patent offensiveness can be recognized at a glance. See Appendix C, containing reproductions of the front and rear covers of the subject matter referred to above.

Anyone who deals in such materials is "reckless" in the extreme (class 4, *supra*), and also meets the requirements of class 3, *supra.*

In the 7 years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and substantially similar circumstantial evidence. *United States v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960, *certiorari* denied, 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (October 10, 1960), rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (November 21, 1960); *California v. Harris,* 190 Cal. App. 2d 887, 893, 13 Cal. Rptr. 642, 646 (May 5, 1961) reversed on other grounds, *In re Harris,* 366 P. 2d 305; *United States v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), *certiorari* denied, 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961); *Harold S. Kahm v. United States,* 300 F. 2d 78 (February 9, 1962) *certiorari* denied, 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *California v. Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Sept. 26, 1962) cert. denied 377 U.S. 994; *New York v. Finkelstein,* 11 N.Y. 2d 300 (1962), *certiorari* denied, 371 U.S. 863 (1962); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (November 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961). See also *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (November 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (December 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,*

176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* 204 N.E. 2d 768 (January 21, 1965); *Missouri v. Vollmar,* 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* .... Ohio St. .... (July 13, 1966); *California v. Campise,* 51 Cal. Rptr. 815 (May 25, 1966); *California v. Culbertson,* 51 Cal. Rptr. 827 (May 25, 1966).

II.

STANDARDS AND CRITERIA FOR REVIEWING THE STATE COURT JUDGMENT.

A. "Obscenity" Is Primarily a Question of Fact.

1. The Terms Used by the Roth Court to Define the Area in Which Police Action Is Authorized Coincidentally Describe What Is Typically a Jury Question.

The obscenity controversy places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments of the Federal Constitution. On the other hand, there is the claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments to the Federal Constitution.

When in 1957, the United States Supreme Court addressed itself to this controversy, it drew the balance between the two conflicting powers which it expressed in terms of the *Roth-Alberts* test, namely "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as

a whole appeals to prurient interest." *When such a state of facts exists,* the police power, reserved to state governments by the Ninth and Tenth Amendments, is operable and can act to proscribe such material.

When the *Roth* court excluded an area of activity from constitutional protection, it did so by defining the area of exclusion in terms which are recognizable in Anglo-Saxon jurisprudence as typical of an inquiry which poses a jury question. See Justice Brennan dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 448 (June 24, 1957). The determination of the "average person" in the "community" is regarded as synonymous with a verdict under our jury system. XL Notre Dame Lawyer 1, 9.

2. Roth-Alberts Confirmed the Rules Established in Prior Case Law.

In our view, the Roth Court intended just this result—They did nothing more than record and update the prior rules on obscenity which had been developed in the federal system under the guidance of Federal Judge Learned Hand. Those rules established the determination of the fact of obscenity as being primarily a jury question, with concurrent areas of responsibility for the court. The reporter's notes to the 1957 draft of the American Law Institute Model Penal Code record at page 16 the results reached in prior case law:

> "13. Obscenity as Fact or Law; Role of Court. Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty."

See also *United States v. Kennerley,* 209 Fed. 119, 120, 121 (S.D. N.Y. 1913); *United States v. Levine,* 83 F. 2d 156, 157 (1936).

B. Both the Court and the Jury Have a Proper Function.

To say that obscenity is primarily a question of fact for the jury, is not to suggest, however, that in every instance such is the case. On the contrary, the court has its proper role, as does the fact finder. As the jury may sometimes overstep its bounds, *United States v. Dennett,* 39 F. 2d 564, so also may a lower court, *People v. Birch et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing Special Term Judge Shapiro's judgment, which dismissed obscenity indictments in 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (September 6, 1963) without trial. In other words, there is a line of demarcation between material and conduct which, because of its redeeming social importance, may be protected as a matter of law, and other material and conduct which has no redeeming social importance and which is either a question of fact for the jury as the finder of fact, or may be obscene as a matter of law (policy). See the reporter's comments to the 1957 draft of the American Law Institute, Model Penal Code, Section 207.10 at page 16, set out above.

This Court expressed its function, in such cases, as follows in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285, 11 L. Ed. 2, 686, 84 S. Ct. 710:

> ". . . In cases where that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they

> are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. . . ."

The division of responsibility and the role which this Court plays, in practice, may in some cases appear difficult of statement. Perhaps the best statement is that of Justice Brennan at the end of the arguments in the *Fanny Hill* case on December 8, 1965: "In other words, we are not making a judgment as experts of literature or prurient interest or anything else, but experts in the application of the constitutional test."

Because the determination involves fundamentally a balancing of two powers, amicus wishes to stress the relative importance of the interest which supports the right of government in this area.

1. The Paramount Right of Government to Regulate Matters Relating to Sexual Morality.

In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wall. 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what

is offensive to *public morality*, the United States Supreme Court said, in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government*. It belongs to that department to exert what are known as police powers of the state, *and to determine what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety. . . ." (Our emphasis.)

The public morality that we are concerned with here are standards which relate to the sex function. Such standards encompass not only the sexual parts as they are exhibited in public displays, but also as they may be permitted by the community to become proper subjects for public discussion.

That such standards do, in fact, exist and are enforced, can be seen from the fact that government uniformly and without serious opposition enforces laws which require persons to conceal the sex organ and private parts of the body while in public. It can hardly be argued that a person might appear naked in the court room under the guise that he or she were "speaking out" on behalf of nudism, nor could that person parade naked elsewhere in the community. His or her subjective intent may be wholesome, but the community can

properly equate such conduct with lewdness, because of the prevailing sentiment in the community concerning standards of decent exposure of the person. Even Justice Douglas, was willing to concede in *Roth (supra)* at page 512, that:

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

Similarly, representations and discussions of sex and its function may be regulated insofar as they do offend public policy as expressed through the obscenity laws.

It is to maintain the sexual standards, which are acknowledged by the great majority of people in our society, that government has, under the police power, enacted laws on indecent exposure and obscenity. Such right is an inherent part of our self-government, having been passed down to us, in our Constitution, from the Common Law Courts of England, which recorded their existence over three centuries ago.

LeRoy v. Sedley, 1 Sid. 168, 82 Eng. Reprint 1036 (1663);

4 Bl. Comm. 64;

Rex v. Curl (1727) 2 Strange 788;

Commonwealth v. Sharpless, 2 S and R. 91, 7 Am. Dec. 632 (1815);

Roth-Alberts, supra.

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows in "Morals Offenses and the Model Penal Code" appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginsburg v. U.S.,* 16 L. Ed. 2d 31, at page

38, fn 12 page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.*, 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

> ". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstratably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism.",

and at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restrains we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the

obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

In sum, the case for the governmental action taken by the state was stated by Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*), at page 502:

"The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Amicus believes that the history of our government refutes petitioner's claim to a supremacy of the personal right of an individual to have a "subjective" standard as a measuring guage for the "mens rea" in the obscenity crime.

We believe the function of the court in this event to be similar to that stated by Justice Brennan in his dissent in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, 448, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957).

"Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

See A.L.I. Model Penal Code 207.10 (1957 draft) Reporter's Comments, page 16; *United States v. Kennerley,* 209 Fed. 119, 120 (S.D. N.Y. 1913)

"The same question arises as would arise upon motion to direct a verdict at the close of the case."

The test might simply be phrased, Is the petitioner "pandering" or is he "speaking". We think there is little doubt from the exhibits in this case that "hard core pornography" is involved, which we would define as material which a state court might hold obscene, as a matter of law. See Appendix B. Having satisfied itself that "free speech" is not involved, it would appear that a "sufficient evidence" standard should suffice in determining whether the *mens rea* requirement had been met under the circumstances *Jacobellis v. Ohio,* 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (June 22, 1964) Justice Warren dissenting.

Under our analysis, the burden of proof presented by the New York statute is an awareness of the character of the materials from an "objective" viewpoint. As pointed out above, there is more than "sufficient evidence" to support the trial court's findings in this regard.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX "B."

SHAME AGENT, By Don Bellmore (15 chapters, 190 pages). EMBER BOOKS c1964.

CHARACTERS:

Oscar Clement .....owner of public relations firm
Millie Clement .....Oscar's wife
Paul Clarke .....employee in Oscar's firm
Kathy .....Oscar's secretary
Norman Hollister .....TV producer
Martha Hollister .....Norman's wife
Ernie Banks .....Newspaper columnist
Rosalind Hayes .....prostitute, model

CHAPTER 1.(pp. 5 to 18)

Pages 5 to 18 describe a sex orgy betwen Paul Clarke, agent in Oscar Clement's public relations firm, and Kathy, Clement's secretary. Paul makes love to Kathy who is lying beside him in a pair of sheer blue panties while he talks on the telephone to Oscar calling him from Hollywood. Paul manages to remove Kathy's panties as he talks on the phone to Oscar, then Kathy removes Paul's shorts. She teases him, caressing and kissing all parts of his body. (p. 13) Paul does his best to handle the phone and Kathy at the same time. Oscar tells Paul he will arrive in New York the next day and ends the conversation. Paul has intercourse with Kathy, and after climax they fall off to sleep.

CHAPTER 2. (pp. 19 to 33)

The next morning Paul and Kathy have intercourse again. (pp. 30 to 32) Kathy tells Paul that Oscar went to Hollywood to try to get Norman Hollister for a client. He is an important TV producer and married to Martha, a former "bed partner" of Paul. (p. 29) Paul is surprised at this news as Oscar has not talked it over with him. He decides not to worry about it as he had the whole weekend ahead of him, and being alone with Kathy—, it promised to be quite a weekend.

CHAPTER 3. (pp. 35 to 53)

Oscar Clement arrives the following Monday. He introduces Paul to Norman and Martha Hollister, and after business negotiations, Norman leaves for an appointment and Paul takes Martha to lunch.

CHAPTER 4. (pp. 55 to 65)

Paul and Martha order drinks, and recall old times together. Martha excuses herself from the table a moment, and Paul is approached by Ernie Banks, a columnist, whom Paul dislikes. He asks Paul to arrange a date with Rosalind Hayes, a friend of Paul, who is sitting alone at another table. Rosie was one of the highest-priced call girls in New York. Paul had shared a bed with Rosie himself, and knew that she disliked Ernie intensely, so he refuses Ernie's request. After lunch Paul takes Martha to her hotel. She sees Norman leaving with a blonde, so she asks Paul up to her room.

CHAPTER 5. (pp. 67 to 80)

Martha and Paul have a heavy drinking session. Pages 74 to 80 describe a sex orgy between them. "Let me make you naked first" Martha whispers (p. 74).

They undress each other slowly, kissing and caressing all parts of the body. They have intercourse, "a wild, abandoned time" (p. 79)

CHAPTER 6. (pp. 81 to 97)

Three days later, Oscar takes ill with the flu, leaving Kathy and Paul alone to run the office. Pages 88 to 96 describe a sex orgy between them. As the couch in Paul's office is much too small, they have intercourse standing up. (p. 95) "That had been fun—real fun." p. 97

CHAPTER 7. (pp. 99 to 106)

The next week, Paul arranges an audition for Norman Hollister. He invites the press, various models, and Rosie Hayes. Norman likes Rosie so Paul arranges a dinner date, knowing Norman wanted to get Rosie in bed with him. It sort of eased Paul's conscience about his affair with Martha, Norman's wife.

CHAPTER 8. (pp. 107 to 121)

Paul calls Rosie on the phone, and she invites him over for a drink, and to talk about the dinner date with Norman. They proceed to get drunk. Pages 114 to 121 describe a sex orgy between them. They undress each other. Paul turns her over his knees and spanks her, "Her buttocks reddened and quivered from the blows of my hand, and Rosie whimpered with ecstasy." (p. 120) They have intercourse (p. 120) and after climax fall asleep in each others' arms.

CHAPTER 9. (pp. 123 to 130)

Paul sets up the date between Norman and Rosie. Rosie auditions for Norman at her apartment, and they go to bed together. Kathy tells Paul that Oscar is try-

ing to sell their agency to the Benson Agency. This is a blow to Paul, as he had hoped to become a partner in the business with Oscar. He decides to try and get Norman as his client and go out on his own, but he needs Martha's help.

CHAPTER 10. (pp. 131 to 145)

Paul has Martha come to his apartment the next evening. Paul talks Martha into helping him in trying to get Norman for a client. Pages 139 to 145 describe a sex orgy between them, They take a shower together, soaping and caressing each others' bodies. They have intercourse in the tub, (p. 144) and after climax wash the soap from their bodies, dry each other with towels, spinkle each other with talcum powder, and go to bed.

CHAPTER 11. (pp. 147 to 155)

Three days later Martha tells Paul her husband doesn't feel he is as well known as Oscar, so Paul decides to ask Ernie Banks to write him up in his column. Ernie says he will do it, if Paul will fix up a date for him with Rosie. Paul agrees, but he knows it won't be an easy job.

CHAPTER 12. (pp. 157 to 165)

Paul talks Rosie into having the date with Ernie. She agrees to go to Ernie's apartment, as she doesn't want "the likes of Ernie" in her bed. (p. 162) Paul calls Ernie about the arrangement, and Ernie promises to write them both up in his column.

CHAPTER 13. (pp. 167 to 178)

Paul goes home that evening and starts drinking. Martha surprises him with a visit. Pages 174 to 178 describe a sex orgy between them. They undress each

other, and dance to music from the record player. "That was a sensational feeling, dancing naked like that. . . ." (p. 175) They have intercourse on the floor and reach climax just as the music comes to a "crashing finish." (p. 178) They go to bed, and as Martha sleeps, Paul lies awake wondering what Rosie was doing with Ernie Banks at that very moment.

CHAPTER 14. (pp. 179 to 186)

The next day, Paul tries to call Rosie on the phone, but she doesn't answer. He calls Ernie, and senses things had gone wrong when Ernie tells him coldly to ask Rosie, and read his column. The column carried the whole story of how Paul tried to get Hollister for a client. Paul knew his career was as good as finished. He goes to see Rosie. She tells him she walked out on Ernie after scratching his face, because he wanted her to do things she could never do and to pose for pictures. She took off her robe, and showed the "ugly blue marks on her breasts and legs" that Ernie had given her. (p. 185) Paul took a cab to Ernie's apartment, and hit him in the face with all his strength, hitting him again and again.

CHAPTER 15. (pp. 187 to 190)

The next afternoon, Paul visits Oscar. Kathy is there. Oscar tells Paul he thought he was dying because he had had a heart attack, but now had decided not to sell the agency, and wanted Paul to go on working for him. He said he would discuss the partnership when he was able to return to the office. Kathy tells Paul she will go back with him, and they leave hand in hand.

LUST POOL. By J. X. Williams (14 chapters, 190 pages). PILLAR BOOK c1964.

CHARACTERS:

Marshall Jones . . . virile, ex-college football player, swimming pool cleaner.

Lolita Mazureck . . . prostitute

Pam Folsom . . . aspiring young actress

Margie . . . mulatto prostitute

Carla Holtzer . . . narcotic addict, Big Tom's wife

Sugar . . . negro prostitute

Big Tom Holtzer . . . vice lord

Lita Morris . . . Lesbian manager of the Hot Spot, strip joint.

Ronnie . . . waitress at the Hot Spot, narcotic addict and lesbian.

Louie . . . bar tender at the Hot Spot.

CHAPTER 1. (p,. 5 to 22)

This is the story of Marshall Jones, swimming pool cleaner, and his sex adventures with various "broads" as he calls them. Pages 17 to 22 describe a sex orgy with Lolita Mazureck a prostitute. Page 19 describes Marsh performing an act of cunnilingus, page 20 describes intercourse. Marsh gets Lolita to break a date with one of her steady customers, a married man, and they go out on the town.

CHAPTER 2. (pp. 23 to 43)

In one night club, Lolita points out three of her customers sitting "with their frumpy wives." (p. 23) "As

long as women like that exist, Lolita and her kind will never be out of a job." (p. 24) Marsh meets Pam Folsom while cleaning the pool at the apartment house where she lives. She is obviously a virgin, too nice a girl to get mixed up in the movie business she aspires to. Marsh feels a "brotherly love" towards her. He meets Carla Holtzer on his next job. Big Tom Holtzer, millionaire vice lord hires him to clean the pool. He never gets around to cleaning the pool as Carla, Big Tom's wife, invites him to the bath house, where they smoke opium from a pipe and engage in a sex orgy. Pages 39 to 43 describe Marshall lying helpless on a couch under the effect of the opium as Carla caresses every part of his body. He wakes up the next morning outside the gates of the Holtzer mansion, in his pick-up truck.

CHAPTER 3. (pp. 44 to 56)

Marsh goes to see Lolita, and meets her friend Margie, a mulatto, who lives across the hall from Lolita. Pages 51 to 53 describe their sex orgy. "I grabbed and played with her in a quickening rhythm. We danced and bounced like a couple of animals." (p. 52). The next day, Marsh sees Pam. He tells her to go back home before she becomes a tramp. "The word 'virgin' was written all over her." (p. 54)

CHAPTER 4. (pp. 57 to 69)

Marsh goes to the Holtzer estate again to clean the pool. As he is about to enter the gate, Carla drives out and runs over the japanese gardner. She made no effort to avoid hitting him. Marsh is so in love with Carla that he agrees to tell the police that the gardener

jumped in front of Carla's car. Big Tom Holtzer gives Marsh a job as bouncer on the weekends at his strip club, the Hot Spot if he will keep quite about the accident.

CHAPTER 5. (pp. 70 to 80)

At the Hot Spot, Marsh meets Ronnie, a waitress, Louie the bar-tender, and Lita Morris the manager. Louis tells Marsh that Lita is Big Tom's mistress. Pages 77 to 79 describe obscene gyrations of a stripper on the stage, and a man jumping up from the audience, with his belt undone as he tries to pounce on her as she lies naked. Marsh throws him out of the club, and feels its not a "bad way to earn fifty clams a night."

CHAPTER 6. (pp. 81 to 94)

The next day Marsh sees Pam again while he cleans the pool. Pam asks him to her apartment for coffee. Marsh accepts, but doesn't want to get involved with her. She says, "Marsh, what in hell does a girl have to do to get you interested in her?" (p. 93) He tells her a girl has to be a woman, and he leaves her sobbing.

CHAPTER 7. (pp. 95 to 107)

As Marsh is cleaning the Holtzer pool, Carla dives in naked and has a swim. After the swim she runs to the bath house with Marsh close behind. Sitting together naked on a couch they smoke "hashish" (p. 101). Pages 104 to 107 describe a wild sex orgy in the pool and intercourse, and perversions between Carla and Marsh as they lay on the pool steps. "I loved her will all my strength, ravishing her body . . ." (p. 106) Marsh carries Carla to the pool house, dries her off and they start their orgy all over again on the couch.

CHAPTER 8. (pp. 108 to 117)

At the Hot Spot, Marsh spies on Christine and Mandy, two strippers, nude and performing fellatio on two men customers in one of the back rooms. (p. 112) Out front on the stage he is shocked to see Pam Folsom putting on a very professional strip act as the crowd goes wild. (p. 114) Marsh, furious at Pam, tells her he will take her home after the club closes that night.

CHAPTER 9. (pp. 118 to 130)

Pages 120 and 121 describe the obscene strip put on by Pam as she did her last show of the evening. Pam asks Marsh to her apartment, and promises she will leave the show if he will make love to her. He agrees but warns her he is in love with someone else. She tells him she is not a virgin, that there was one other, a boy she knew in high school. Pages 127 to 130 describe their orgy, as he performs an act of cunnilingus on her, ending in intercourse and wild climax. (p. 125)

CHAPTER 10. (pp. 131 to 141)

The next morning, Pam and Marsh have another orgy in bed, "Not as long this time, but just as good." (p. 133) They spend the weekend together, and Pam says she is going to keep on working at the club. On this pool cleaning job, Marsh runs into the two prostitutes again, Lolita and Margie. Pages 136 to 141 describe a wild sex orgy with both girls at once in Lolita's bed, "we were all involved in an inextricable tangle of arms and legs, breasts, middles, buttocks—" (p. 138) "Not only did they caress me they managed to get at one another too." (p. 138) They have another round of drinks, "and then we were back in the bedroom, piled

PASSIONATE FREAKS...

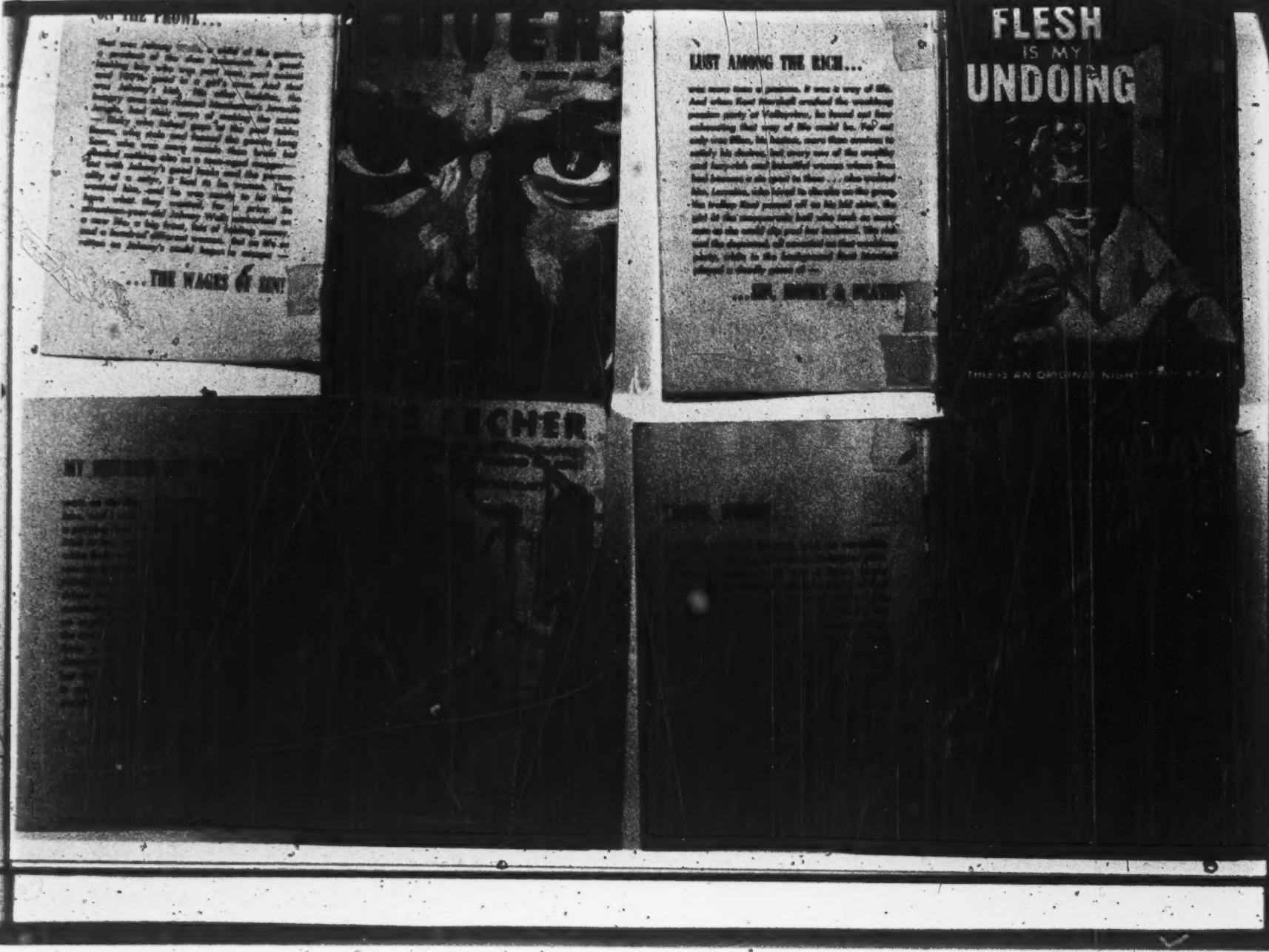
...ON A SEX HIGHWAY!

LUST SPREE...

...PASSION CARNIVAL!

SHE HAD A BIG BODY WITH A BROOM, LUST TO

PASSION TRAMP


...THE WAGES OF SIN!
LUST AMONG THE RICH...
FLESH
IS MY
UNDOING

FOUR WILD GIRLS...
in a trailer. four girls who practiced the oldest profession known to women. Four girls who were ruled by a lust-passion that demanded they ruin the town of Coldwater and its inhabitants. The first was Jan, who had lost her trailer-camp soldier-husband to a two-eyed town serpent. Joy vowed to make the town, the trailer camp and particularly her husband, regret what they had done to her. Second and third were Marie and Andrea, one a voluptuous blonde, the other a petite brunette, but both lesbians, who embraced men for the money and each other for love. Last was Essie, the Negro who was almost a zombie, who gave her body because she thought she was dirt. All four of them on personal vendettas...
...ON A PASSION RIDE!
TRAILER TROLLOP
THE PASSION BUG...
LOVE NEST
The SINFUL ONES

IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

No. 16

WILLIAM L. AUSTIN,

vs. *Petitioner,*

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Reply Brief of Amicus Curiae Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondents.

I.

Counsel for petitioners is in error when he argues to this Court in his reply brief:[1]

[1]Petitioners' Reply to Briefs Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents, at page 2.

> "Since, however, the Citizens for Decent Literature, Inc., known commonly as 'CDL', has sought in its briefs to generate 'hydraulic pressures' by . . . *distortions of the governing law (Redrup Br. 24; Austin Br. 34-35; see, California Penal Code §311-(e); Stats. 1961, c. 2147, p. 4427, §(6), . . .:"* (our emphasis).

That which is claimed as a distortion (Redrup Br. p. 24; Austin Br. pp. 34-35) is an entirely correct statement of the "governing law" as it existed at the time of *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959), which was the matter under discussion in both briefs. It could hardly be otherwise, in view of the fact that the appellate precedent referred to, was the California appellate decision which was being reviewed by this Court in the *Smith* case in 1959. Counsel traps himself in his own argument (*supra*) which contains an admission that the California statute *he refers to* (section 311(e)) *was passed and adopted by the California Legislature in 1961, which was two years after the Smith case was decided.*

It is significant that counsel for petitioners has found no answer to the aforesaid arguments.

II.

Counsel for petitioners notes at page 17 of his reply brief:

> "In one of the sets of photographs attached to the CDL brief amicus in Redrup herein (see photographs, p. 7),[2] there is reference to the case

[2]More exactly, amicus made reference to six of the seven books named in the Houston indictments. See CDL's Brief Amicus Curiae in the *Redrup* case, photographs, pp. 6, 7.

> of 'U.S. v. Hamling et al. Houston, Texas Indictments, Sept. 11, 1965' .... It is important to note that after a six-week trial, the jury was unable to reach an agreement and a mistrial was declared, *a conclusion known to amicus but which is left unmentioned in its briefs.*' . . ." (our emphasis).

What petitioners' counsel states is true—this result was known to amicus, as it was to the entire nation and this Court through the wide press coverage given at the time the mistrial was announced on Friday September 2, 1966. What was not known to the general public or this Court, however, was the trial factors which played a dominant role in this peculiar result and the post trial statements attributed to District Judge Ingraham.[3]

Because such matters did not bear directly upon the argument as to which the information was offered, *i.e.*, that such paperbacks had a notorious reputation, a complete discussion was not felt necessary nor was it offered. At this time, however, amicus will reply briefly[4]

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[3]District Judge Ingraham's statement appears at page 19 in Petitioners' Reply Brief to CDL's Brief Amicus Curiae, as a part of the Houston Chronicle article of Sept. 5, 1966.

[4]A more complete discussion of the peculiar result in the *Houston* case appears in a amicus curiae brief filed in this Court concurrently with a motion under Rule 42.1 to appear as amicus curiae and to file a partial brief in support of the Respondent in *Aday et al. v. United States of America*, October Term 1966, No. 149. Although Mr. Fleishman, as counsel for petitioner *Aday et al.* points out in footnote 1 on page 3 of Petitioners' Reply to the Memorandum for the United States in the *Aday* case that Judge Ingraham announced his intention at the start of the trial to follow the law laid down by District Judge Fox in the *Grand Rapids Aday* trial, he does not tell this Court that such pattern was materially altered when the United States attorney at the conclusion of the trial asked that the test for obscenity given by Judge Fox be changed *to require proof as*

(This footnote is continued on the next page)

inasmuch as petitioners' counsel has used the result reached in the *Houston* case to support his argument that "one cannot tell a book from its cover."[5]

District Judge Ingraham's statements in Court at the time that the mistrial was declared were the comments of a trial judge who had not had the benefit of a full disclosure of the facts surrounding the publication of the books involved. He was not as knowledgeable as the typical book seller on Main Street, Los Angeles or 42nd Street, New York. He had not been informed that the same brand of books had been held to be hard

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to three separate elements (Houston Chronicle, Aug. 23, 1966, page 6, sec. 1), as advocated in the lead opinion of Justices Warren, Brennan and Fortas in the no-clear majority decision in *John Cleland's Memoirs of a Woman of Pleasure et al. v. Attorney General of the Commonwealth of Massachusetts*, ... U.S. ...., 16 L. Ed. 2d 1, 86 S. Ct. .... (Mar. 21, 1965). We contend that the three element test, while proper in an injunction action under certain circumstances, has no application in a criminal action and is redundant, misleading, and inaccurate. See National Decency Reporter Vol. III, No. 6, June-July 1966 "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions at page 16 "The Constitutional Criteria are not Applied Independently in Criminal Cases." If engrafted as a requirement on the *Roth* test, the same will create greater havoc than did this Court's development of restrictive rules in previous restraint cases during the period 1958-1965. See CDL Commentaries on the Law of Obscenity Vol. No. 3 pp. 1-4 *et seq.* and CDL's Brief Amicus Curiae in the *Fanny Hill* case at page 36. *How can a jury not be mislead when it is told that after it finds that the dominant theme of the material and the publisher's intent is an appeal to prurient interest and is substantially beyond customary limits of candor (patently offensive), it must also find that it is utterly without redeeming social value.* After nine days of deliberation and a mistrial, one juror told the Houston Post that he felt "the three tests for legal obscenity were drafted in an ambiguous manner purposely to prevent 12 people from being able to agree." Houston Post, Sept. 3, 1966. Having seen what such a test has done in the California jurisdiction and having examined the Houston materials we are in total agreement.

[5]Petitioners' Reply Brief to Briefs Amicus Curiae of CDL at page 17.

core pornography by the highest courts in New York and Kansas and to be obscene by the highest courts in Illinois and Georgia and by the Circuit Court of Appeals for the Second Circuit.[6] See CDL's Brief Amicus Curiae in *Redrup v. New York,* pages 30-31. Nor was he aware that seven of such books are presently before this Court awaiting review. See CDL's Brief Amicus Curiae in *Redrup v. New York,* photographs pages 1-2. Judge Ingraham ruled that there was insufficient evidence of pandering and refused to charge the jury on this issue. See Houston Chronicle article of September 4, 1966. Through no fault of his own Judge Ingraham was no better informed than District Judge Templar when he dismissed the federal indictments in *United States v.. Linetsky,* No. T-CR. 582

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[6]In a radio panel discussion, Mr. Fleishman, after having related to the radio audience the post trial statement of District Judge Ingraham, was asked by Counsel for CDL "Did any of these results which have been recently found throughout the United States with respect to the Nightstand, Midnight, Ember and Leisure Readers (the decisions referred to in CDL's Brief Amicus Curiae in the *Redrup* case at pp. 30, 31 and photographs pp. 1, 2), did these results get to the judge?" "Did he understand that there are 7 books before the United States Supreme Court which have been finally approved as obscene in other jurisdictions? Did he know of the results in Kansas? Did he know of the results in trial courts in other states? Mr. Fleishman replied." The United States of America had five lawyers representing the United States of America at the trial. One man from Washington who was the expert from the Department of Justice in this area and there were four local lawyers adequately energetically, conscientiously representing the interest of the United States of America and they tried the case which was the best case they knew how to try. All of the relevant information that they thought they could possibly bring before judge and jury was brought out. . . . I don't know if it got to the judge. It was not adduced as relevant evidence. . . ." We are only saying in this note that District Judge Ingraham's post trial statement was not based on the best information available, and should not be given weight in support of Petitioners' argument that you can't tell these books by their covers.

(D.C. Kans.) (June 24, 1965) and in *United States v. Wasserman* (D.C. Kans.) No. T-CR 581 (June 29, 1965). See CDL Amicus Curiae Brief in the *Fanny Hill* case at page 43 entitled "A Problem of Communication" and CDL Commentaries on the Law of Obscenity Vol. 3 pages 1-7 *et seq.*

Respectfully submitted,

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RAY T. DREHER,
Counsel for Amicus Curiae.

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Petitioners' Reply to Briefs Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents.

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Petitioners' Reply to Briefs Amicus Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, in Support of Respondents

An organization known as the Citizens for Decent Literature, Inc., by its counsel, Charles H. Keating, Jr., James J. Clancy and Ray T. Dreher, has submit-

ted briefs *amicus curiae* in support of respondents in the above entitled causes. Insofar as these briefs purport to discuss the legal and constitutional issues involved in these proceedings, petitioners believe it appropriate to refer the Court to the briefs of the parties in the two causes, and the oral argument which will be made thereon.

Since, however, the Citizens for Decent Literature, Inc., known commonly as "CDL", has sought in its briefs to generate "hydraulic pressures" by appeal to such emotionally charged slogans as "the public interest in good public morality relating to the sex function" (Redrup Br. 16; Austin Br. 23), by distortions of the governing law (Redrup Br. 24; Austin Br. 34-35; see, California Penal Code §311(e); Stats. 1961, c. 2147, p. 4427, §6), and by broad reference to and reliance upon oral and documentary material *dehors* the record, some comment by petitioners upon the aims and objectives of CDL and similar organizations, appears required.

1. As petitioners understand the involved and obscure arguments of CDL, it would appear that the organization is requesting this Court to enunciate principles with respect to the question of scienter in obscenity prosecutions which will reduce this element of the offense to such ineffectiveness as to virtually eliminate the requirement of proof of scienter. Using such phrases as "recklessness", "negligence", "reasonable belief", "knowledge of contents", "character", and other terms of a like nature, the argument of CDL comes

down to this: that scienter means no more than proof, directly or indirectly, that a publisher, distributor or retailer knew that a book or magazine had a cover which by depiction or representation contained some connotation of sex. Photographs of covers of books and magazines which CLD has inserted in each of its briefs *amicus curiae* make this point abundantly clear. This Court is asked, in disregard of the First Amendment and the Constitution, to place the balance on the side of "The Paramount Right of Government to Regulate Matters Relating to Sexual Morality". (Redrup Br. 36; Austin Br. 51).

It is the position of petitioners that the public statements of CDL reveal more explicitly than can ordinarily be presented within a legal framework the true intent and purpose of those who favor the censorship of books and other media of communication. That purpose and objective is so to loosen the standards for judging obscenity as to permit the broadest suppression of all publications which this organization, and related censorial groups, deem objectionable. The standards of this organization, therefore, become of critical importance. What is it that the CDL wants to suppress? What are the criteria for suppression? What are the methods which the organization employs in accomplishing its aims and objectives? Petitioners think it best to let the CDL speak for itself.

The CDL publishes a Newsletter entitled "The National Decency Reporter", a monthly publication, which

is distributed nationally at a subscription rate of $5.00 per year. Its editorial department includes Charles H. Keating, Jr., Founder and Director of the Citizens for Decent Literature, Inc. "The National Decency Reporter" of December 1, 1963, Vol. I, No. 4, contains on its cover the following matter:

"'SHOW ME WHAT HE READS, AND I'LL TELL YOU WHAT HE IS.'"

"'I'M A MARXIST,' he said seriously. 'I BECAME INTERESTED ABOUT THE AGE OF 15. AN OLD LADY HANDED ME A PAMPHLET ABOUT SAVING THE ROSENBERGS.' (Julius and Ethel Rosenberg were executed as Communist spies.) — LEE HARVEY OSWALD.

"CITIZENS FOR DECENT LITERATURE, INC.

3701 Carew Tower Cincinnati 2, Ohio

"From the desk of
CHARLES H. KEATING, JR.

[Hand-written]

"Cincinnati, Ohio
December 1, 1963

"Dear Friends of Decency,

"I share your grief that this civilized nation has lost its President by assassination.

"The slayer is a product of Communism. His home was reported filled with Communist propaganda and texts. Other reading indicated a propensity for sex and violence stories. Oswald was typical of the aethistic [sic], materialistic system

of Communism which disregards the worth of man and denies the existence of God.

"Oswald was also an example of the old adage 'Show me what he reads, and I'll tell you what he is!' Whether it is Communist propaganda or obscenity, reading and 'pouring [sic] over' such material deprives individuals of right reason and reduces men from rational beings to animals.

"We hope the Supreme Court of the United States can be brought to this realization.

"Sincerely,

Charles H. Keating, Jr.

"OSWALD'S SLAYER, RUBY, A DESPICABLE MAN WHOSE TRADE IS FLESH, IS NO LESS REPRESENTATIVE OF OUR PRESENT PLIGHT BROUGHT ON IN SUBSTANTIAL MEASURE BY UNREALISTIC JUDICIAL APPROACH AND RULING WITH RESPECT TO IMMORALITY AND DECADENCE."

In 1954, Professors Lockhart and McClure, in their article "Literature, The Law of Obscenity and the Constitution," 38 Minn. L. Rev. 295, analyzed in detail the forces and methods involved in the censorship of books, magazines and other communications (*Id.* at 302-320). Describing the activities of these censorial groups, the authors concluded with respect to the persons who engaged in such censorial activities (*Id.* at 320):

". . . Often an emotionally disturbed person, he sets out to look for smut and consequently finds

it almost everywhere, oblivious of the context and the values of the book in which he finds what he seeks. His one-track interest often is reinforced when his smut-snuffling becomes a professional occupation. Surely, Heywood Broun was far from wrong in observing that '[o]nce censorship is let loose, nothing is safe from the smirch of its exceeding dirtiness.' "

In 1960, Professor Lockhart and McClure, in their article entitled "Censorship of Obscenity: The Developing Constitutional Standards", 45 Minn. L. Rev. 5, 9-11, made the following comment:

"With the retreat of the NODL and the decline in the systematic use of lists of proscribed publications came a new type of organization and a sharp increase in the practice of abruptly prosecuting news dealers on criminal charges without forewarning.

"The new type of organization began with the formation of Citizens for Decent Literature in Cincinnati, Ohio. Carefully avoiding the much-criticized practices of the NODL, CDL counsels against telling any dealer what not to sell. Instead, CDL limits its operations to stirring up public agitation against magazines thought to be obscene, and to encouraging and assisting law enforcement officials in the prosecution of obscenity cases. Encouraged by a number of successful prosecutions of wholesale and retail news dealers in Cincinnati, interested individuals in other Ohio cities formed similar local organizations. In 1958 a statewide organization was formed, and it was not long before similar groups began to spring up in

other parts of the country. A national organization was formed in February, 1960. So far, the only serious criticism leveled at the CDL has centered on its organized campaigns to write letters to judges who have obscenity cases pending before them.

"Perhaps as a result of the encouragement given to them by CDL groups, law enforcement officials all over the country increasingly resorted to swift police raids, followed by arrest and criminal prosecution for selling obscene publications. For example, last year in Indianapolis, Indiana, city police and sheriff's deputies raided 16 drug stores, a wholesale news dealer's warehouse, a variety store, and a book store, seizing 1,500 copies of more than 70 magazines. The manager of the wholesale news business, the manager of a chain of drug stores, and 19 retailers were arrested and charged with selling such allegedly 'obscene' publications as Playboy, National Enquirer, Police Gazette, and Tempo. After the arrests some of the retailers closed out their magazine departments. As might be expected, the local CDL group supported the raids and arrests.

"Criminal prosecutions have an enormous impact upon retail and wholesale news dealers—reputable businessmen in their communities. The embarrassment and shame of being charged with the crime of selling obscene literature, added to the trouble and expense of defending against criminal action, are enough to terrify dealers in any community in which the practice of criminal prosecution without forewarning has been employed. In Cleveland, we are informed, only one rather ob-

> scure book dealer has dared to stock the Kronhausens' Pornography and the Law, a serious effort to define matter that may constitutionally be censored as obscene. And in Cincinnati the climate is such that the public library director refused to accept a copy of Vladimir Nabokov's Lolita, even as a gift to the library. Perhaps the severe impact of criminal prosecution, radiating far beyond the particular books and magazines upon which successful prosecutions have been based, explains in part why law enforcement officials have made relatively little use of the injunctive and book libel proceedings that are available to them in many states."

Concurring in *A Book etc. v. Attorney General of Massachusetts*, 383 U.S. 413, 86 S. Ct. 975, 982, Justice Douglas stated:

> "Every time an obscenity case is to be argued here, my office is flooded with letters and postal cards urging me to protect the community or the Nation by striking down the publication. The messages are often identical even down to commas and semicolons. The inference is irresistible that they were all copied from a school or church blackboard. Dozens of postal cards often are mailed from the same precinct. The drives are incessant and the pressures are great. . . ."

The Citizens for Decent Literature, Inc. also publishes "The Vanguard", described as "Young Adults Newsletter," which is also nationally distributed. The March 1964 issue of "The Vanguard", Vol. II, No. 7, purports to deal with "Effective Letter-Writing."

Among the instructions contained in the publication were the following:

"TO PROSECUTORS:

IDEAS TO GET ACROSS:

"(1) Compliment them for efforts in the past to control and prosecute obscenity.

"(2) Express concern over flood of newsstand filth which is in violation of existing local, state, and national laws.

"(3) Insist that our community standards are higher than the 'dominant theme' of many books available on our newsstands.

"(4) Urge that public opinion is in support of prosecution even though it is not always openly voiced.

"(5) Make reference to successful prosecution in other areas, e.g. in Ohio due to CDL efforts.

"SAMPLE letters or postcards to Prosecutor of town and county, State, and U.S. Attorney General:

"'As a citizen (mother, father, youth, businessman, etc.) of (name of city), I was recently shocked when someone showed me certain magazines available on our newsstands. It is difficult to understand how so many people are so concerned about the effects of cigarettes, alcohol, and narcotics on our youth and yet are unaware of the menace of obscene literature which inevitably falls into the hands of youth.'

"'I am convinced that many magazines available locally on our newsstands violate the local and

state laws against obscenity. Unfortunately, your efforts are not supported by a tide of articulate public opinion when you go into court to prosecute the muck merchants. I really believe our local and even national standards are considerably above many of the books and magazines available even though most people don't go to the trouble of expressing their opinion.'

"TO ELECTED OFFICIALS:

IDEAS TO BE EXPRESSED:

"(1) They are elected officials, responsible for the interests of the citizens.

"(2) We feel they are not sufficiently aware or concerned about the obscenity problem.

"(3) Mayors and Governors—should make every effort to prod the legislative branch to pass adequate legislation and to prod the judiciary to prosecute offenders.

"Senators and Congressman—State and U.S.—should study laws to see if they need strengthening and clarification to plug loopholes. Bills similar to ones already enacted in other states (and enforced) should be promptly introduced and passed. Special legislation protecting youth (as in New York) should be enacted swiftly.

"(4) Aid to education, delinquency studies, housing developments, urban renewal, and the solution of the race problem are short-sighted goals, if the character, mind, and morals of our youth are allowed to be constantly assaulted, eroded, and corrupted by obscenity.

"SAMPLE letter or postcard to elected official:

"'I realize that in a democracy, freedom of speech and the press is and must be an "article of secular faith." But isn't the flood of obscenity displayed on our newsstands ample proof that freedom has become license and that absolute liberty for a small minority is resulting in moral enslavement for the majority? As mayor (senator, congressman, governor, etc.) of our town (state), we have elected you to promote suitable legislation and enforce prosecution involving this matter. I beg you to take action swiftly.

"TO STATE SUPREME COURT JUSTICES: IDEAS TO BE EXPRESSED:

"(1) We are thoroughly familiar with the U.S. Supreme Court's 1957 'Roth' decision. ('Whether to the average person, applying contemporary COMMUNITY standards, the dominant theme, taken as a whole, appeals to the prurient interest.')

"(2) We feel that 'community' does not mean 'national' or even national community average.

"(3) If national standards are the yardstick, how can a local jury (except one of psychologists, publishers, lawyers, educators, sociologists, etc.) determine what precisely the standards are?

"(4) We feel that in effect 'national' standards would end up as the lowest or near lowest of all U.S. communities, e.g. slums of great cities.

"(5) We know that other statutes have secured convictions on the basis of local community standards in accord with local ordinances.

"SAMPLE letter or postcard to New Jersey State Supreme Court Justices on a particular issue:

"'Perhaps the average person in Hudson County or in any New Jersey community isn't as articulate as he should be in voicing his opinion about the flood of obscene materials. Most people I know agree with me that obscene books are readily available and that we local citizens should have the right to set our own standards of decency. We feel that if you had polled public opinion you would not have reversed the conviction of Hudson County News because of the national v. community standards issue. Are we to be measured in Hudson County by 42nd Street, New York City, or by the slums of Chicago? How does one arrive at an average of all U.S. communities?'"

In "The Vanguard" of January 1964, Vol. II, No. 5, there appears an editorial by Charles H. Keating, Jr. entitled "WHAT ABOUT PLAYBOY MAGAZINE". The article reads as follows:

"Many of the youth of today, particularly the young men, read Playboy magazine. Most young persons have seen it on occasion. Very few escape its presence in the thoughts, words, or actions of their contemporaries.

"In the content of the magazine and in the laborious Playboy Philosophy, the doctrine comes through to me as being diametrically opposed to the basic Judeo-Christian principles of Western Civilization. The opposition is to those principles which have given creativity, strength, and stability to our nation—the leader of Western man and of the peo-

ple who have reached the highest peak of civilization yet known.

"It seems to me that Playboy's philosophy is not a mere dormant or academic opposition to morality, right reason, and common sense, but an activating proposition which, in fact, violently works toward the overthrow of the bases of our society. For example, it seems apparent in the philosophy that women are reduced to playthings for men—something to be used and discarded. The emergent and emancipated female in the practicalities of the philosophy loses the exalted status which morality, integrity, sacrifice, and valiant endeavor have brought her, as she is relegated to an animalistic state, with total emphasis on her physical contribution to the gratification of the lust and desire of men—and perhaps a bit of the evident tendency of some modern women to masochistic delight is also involved.

"And shall we speak for a moment of freedom? It must be obvious that this philosophy is one which enslaves to lust and prurient interest, one which destroys moral integrity and spirituality. It is a philosophy—a creed if you will—inimical to freedom.

"And since this is a paper for youth, let me say that it is my opinion that very few, if any, young people can dwell on Playboy magazine without committing sin. Sin is a personal affront to God. It is an insult—a spit in the face to your Creator, your Redeemer, and your Judge.

"Sin is not an old-fashioned concept. It is an omni-present reality—an eternal proposition which

in justice requires punishment. While I think the idea of punishment, especially regarding youth, can be overdone, it can never be ignored. Hell, for example, was created for and exists to punish. Someone once accused me of saying that 'everyone was going to hell in a handbasket.' I have never said this, but it is an appropriate thought which should give caution to all of those who succumb to the temptation and expose themselves or others to immorality, licentiousness, and lewdness.

"Will you allow me (who because of this article will be ridiculed and derided) to suggest that there is tremendous good in the world, in literature, in poetry, in pictures, etc., and developing an affinity for goodness, truth, and beauty is that which provides joy, happiness, right reason, and stability. It is my judgment that Playboy is the opposite of good and will bring you the opposite results."

In July 1964, "The National Decency Reporter", Vol. I, No. 12, contained on its cover page "A LETTER FROM THE EDITOR TO ALL CITIZENS FOR DECENT LITERATURE". Among other things the letter stated:

"I have just spoken with a heartsick father who found his son, a high school junior, pouring over some magazines which were going the rounds in the boy's class. The magazines which I have in front of me are *Naughty Nylons, Mood, Monsieur, Caper, Jem, Modern Man,* and *Man's Favorite Pastime.* The magazines, in my opinion, are nauseating and depraved—capable of poisoning any mind at any age.

* * *

"'I can only assume that the Supreme Court of the United States, who is loosing [sic.] this flood of filth upon each and all of us, is unaware of what its decisions as a Supreme Board of Censors are doing to American morality.

"If this assumption is wrong and they are aware of the nature and extent of obscenity in this country today, then with a prayer for their souls, I think that each and everyone of us should work irrevocably that those of the Justices who have unleashed this demon of obscenity from the pits of Hell be removed or controlled.

* * *

"If the Court wants to act as a Supreme Board of Censors, let them. Let them, however, know that communities across the length and breadth of this land are not going to swallow the depravity that is currently on the newsstands; and you can do this by insisting to local officials that they arrest and prosecute obscenity peddlers wherever and whenever they are found.

"If the Supreme Court, at its level, wants to reverse the convictions, the effect of many prosecutions will, nevertheless, be felt.

* * *

The Citizens for Decent Literature, Inc., and its officers are entitled to enunciate whatever standards they please for the reading or viewing of books, magazines or other media of communication by their members. They are not entitled however, it is submitted, to encourage the lawless suppression of material, or to impose their religious or secular views upon the community at large. The intemperate attitude which the or-

ganization expresses for courts sworn to defend the Constitution and all the principles embodied therein, and the unseemly pressure methods which are employed, give ominous warning of the large-scale suppression and book-burning which these extra-legal groups contemplate if the standards for judging obscenity and scienter are loosened. "Unless there be this protection, a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." *United States v. Klaw*, 350 F.2d 155, 170 (2 Cir. 1965).

2. The desire of CDL to reduce the question of scienter in obscenity prosecutions to mere knowledge of the contents of the covers of books and magazines is, of course, understandable in the light of its professed objective. The standard which CDL proposes is the equivalent of a simplistic method of wholesale suppression of books and magazines in all the book stores and newsstands throughout the country, together with an overwhelming tide of criminal prosecutions in every local community. The standard is intended to facilitate the extra-legal activities of censorial groups and encourage the arbitrary actions of police officers and prosecutors.

The photographs of covers of books and magazines which CDL has annexed to its briefs *amicus* do not, it is submitted, support its position. In the first place, these covers do not substantially exceed in depiction of sex or nudity the covers which are contained in literally thousands of other books and magazines, including men's and women's magazines which are in general family circulation as well as writings which have been authored by Nobel Prize and Pulitzer Prize winners and other authors of literary distinction. It cannot be claimed, therefore, that these covers are in any way ob-

scene within the constitutional standards for judging obscenity.

In the second place, it is equally clear that one cannot tell a book from its cover. In short, no rational inference can be drawn from viewing the cover of a book or magazine that the contents of such book or magazine goes substantially beyond contemporary community standards, appeals to the prurient interest and is utterly without redeeming social importance.

Again, petitioners exemplify these arguments from material contained in the CDL briefs.

In one of the set of photographs attached to the CDL brief *amicus* in *Redrup* herein [see photographs, p. 7], there is reference to the case of "U.S. v. Hamling et al Houston, Texas Indictments, Sept. 11, 1965". This particular case was a prosecution which was brought under the multi-venue federal obscenity statute in Houston, Texas against California residents involving seven paperback books under a 26-count indictment (*United States v. Hamling, et al.*, United States District Court for the Southern District of Texas, Houston Division, CR. No. 65-H-172). It is important to note that after a six-week trial, the jury was unable to reach an agreement and a mistrial was declared, a conclusion known to *amicus* but which is left unmentioned in its briefs. During the course of the trial, the witnesses on behalf of the Government, the retailers of the books involved, testified with respect to the paperback books and other writings which they received from established publishing companies, such as Signet Books, Pocketbooks, Inc., Lancer, Beacon Publishing Co., Kable, Gold Medal, Monarch, Popular Li-

brary, and Grove Press [Rep. Tr. 34-40]. The testimony of these Government witnesses ran as follows:

"Q. All right. Now, it is a fact, Mr. Milburn, that over the five or six year period that you have been in your place of business that you have re-received literally thousands of paperback books which have covers on them entirely similar to the covers on the seven books involved in this case?

"A. Definitely, sir.

* * *

"Q. Isn't it a fact, Mr. Malone, that virtually every publisher puts out material that deals candidly with sex, so far as one can tell from the covers?

"A. Not only books, but all your magazines.

"Q. And all of these books that appear to deal with sex which you put in your adult section, is that the fact?

"A. Yes, sir.

* * *

"Q. Isn't it the fact, Mr. Malone, that over the period of time that the FBI was collecting Reed books, you received literallly thousands of books from, literally thousands of publications that had covers and contents similar to those before you?

"A. Yes, sir.

* * *

"Q. It's a fact, is it not, that virtually every publisher and every distributor has a line of books which are appealing to a sexual interest, isn't that the fact?

"A. Yes, sir." [Rep. Tr. 40, 69-70, 76, 120].

Commenting upon the mistrial in the *Houston* case, the Houston Chronicle (Sept. 5, 1966, p. 2, sec. 6), stated in an editorial as follows:

"A mistrial probably was the logical end to the long court dispute over obscene books. Take any 12 representative Americans and they're not likely to agree on what constitutes obscenity. Even the U.S. Supreme Court can't agree on that.

"This inability to define obscenity is a very good reason for government to proceed cautiously in trying to tell a free people what it can and cannot read. The best solution, as U.S. Judge Joe Ingraham suggested, may be to leave it to the individual and hope that education and cultivation of better tastes will provide a satisfactory answer.

"This was a good trial—that is, a fair one in which jurors were exposed to valid arguments on both sides of the controversy. It centered on seven individuals and three firms whom the Justice Department charged with shipping obscene books across state lines. Counsel on both sides argued persuasively. The trial lasted six weeks and cost the government an estimated $100,000. The jurors deliberated nine long days before deciding they were hopelessly deadlocked and unable to reach unamimous agreement.

"Judge Ingraham spoke wisely, we think, when he advised federal prosecutors to 'take a long, hard look' at their evidence before proceeding with a new trial. He said 'there were many times during the trial that I thought, "Is it worth it?" Obscenity is in a gray area of the law. Some of it is blackish and some whitish, but none of it is black or white.'

"Citizens who have followed this trial are likely to share the judge's doubts. Most will agree that society, acting through representative government, does have the right to prohibit certain offensive types of literature. That was not the issue here. Where the going gets tough is in deciding just where to draw the line. Should the view of the least tolerant prevail, many citizens would find themselves deprived of their right to decide certain things for themselves. Through the ages, man's record of book-burning and censorship is not good.

"When society cannot arrive at a substantial agreement on obscenity—and we think the jury deadlock accurately reflects the broader view—then it is better to take no action at all."

In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 489-491, Justice Harlan stated:

". . . Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' Divorced from their 'prurient interest' appeal to the unfortunate persons whose patronage they were aimed at capturing (a separate issue), these portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course not every portrayal of male or female nudity is obscene. See Parmelee v. United States, 72 App.D.C. 203, 206-208, 113 F.2d 729, 732-734; Sunshine Book Co. v. Summerfield, 355 U.S.372, 78 S.Ct.365, 2 L.

> Ed. 2d 352; Mounce v. United States, 355 U.S. 180, 78 S.Ct. 267, 2 L.Ed.2d 187. Were we to hold that these magazines, although they do not transcend the prevailing bounds of decency, may be denied access to the mails by such undifferentiated legislation as that before us, we would be ignoring the admonition that 'the door * * * into this area [the First Amendment] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests'. . . ."

It is submitted therefore that it offends both logic and law to argue that guilty knowledge and unlawful intent in an obscenity prosecution is established by mere proof of knowledge of the cover of a book or a magazine by either a retailer, distributor or publisher. As Justice Douglas observed in *Ginzburg* and *Mishkin:*

> "The use of sex symbols to sell literature, today condemned by the Court, engrafts another exception on First Amendment rights that is as unwarranted as the judge-made exception concerning obscenity. This new exception condemns an advertising technique as old as history. The advertisements of our best magazines are chockfull of thighs, ankles, calves, bosoms, eyes, and hair, to draw the potential buyers' attention to lotions, tires, food, liquor, clothing, autos, and even insurance policies. . . ." (86 S. Ct. at 969.)

Conclusion.

In a democracy, liberty of the press is essential. Especially is this true in a self-governing society where faith is placed in the people themselves to reach the truth in the marketplace of ideas. This Court has held that there is a limitation upon the exercise of freedom of the press, and that limitation is "obscenity". This Court has stated, however, that the standards for judging obscenity are strict and must be strictly confined. The same viewpoint, it is submitted, must exist with respect to the issue of "scienter" in obscenity prosecutions.

If the position advocated by CDL and by respondents in these causes is adopted, a constitutional requirement of proof of scienter will, it is submitted, become a cloak for, instead of a safeguard against, the destruction of a free press. Without free speech and a free press, a democracy can hardly survive and we should avoid such an end, it is submitted, by preventing the destruction of these liberties at the beginning.

Respectfully submitted,

STANLEY FLEISHMAN,
Counsel for Petitioners.

SAM ROSENWEIN,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 16

WILLIAM L. AUSTIN, PETITIONER,

vs.

KENTUCKY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF MC CRACKEN COUNTY, COMMONWEALTH OF KENTUCKY

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[fol. 1-2]

IN THE McCRACKEN COUNTY COURT

Complaint—October 11, 1963

The affiant, Mrs. Catherine Wathen, 624 No. 5th Street, being duly sworn says that on the 28th. day of September 1963, in McCracken County, Kentucky, William L. Austin and Mrs. Ruth Austin—d/b/a Readmore—117 South 5th Street did unlawfully with knowledge of the contents or character sell, offer to sell, have in possession with intent to sell and offer to sell two magazines, to-wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", both of said publications being obscene and containing obscene pictures and writing or printed material of an indecent character.

Subscribed and sworn to before the undersigned Judge by the complainant this the 11th. day of October, 1963.

Catherine Wathen, Complainant.

In the McCracken County Court

Warrant or Summons—October 11, 1963

Commonwealth of Kentucky,
To All Peace Officers in the Commonwealth, ss.

The undersigned Judge, having considered the complaint herein, does hereby command you to (summons to appear at formal hearing) William L. Austin and Mrs. Ruth Austin and bring said person or persons forthwith before the Judge of the County Court of McCracken County, Kentucky, (or if he be absent or unable to act, before the nearest available magistrate), to answer the above complaint made by Mrs. Catherine Wathen charging said person or persons with the offense of offering obscene literature for sale.

Formal hearing will be held before the McCracken County Court on the 14th day of October, 1963 at the hour of 2:00 P.M., and you will have then and there this writ, with due return how you have executed it. The foregoing complaint was sworn to before me and this writ was issued in McCracken County, Kentucky, this the 11th day of October, 1963.

Roy Stewart, Judge, McCracken County Court.

Witnesses: Margaret Pruitt—Readmore, Pat McWaters.

[fol. 3]

IN THE McCRACKEN COUNTY QUARTERLY COURT

At a Special Session of Said Court Held November 6, 1963.

Hon. Roy Vance, Trial Commissioner, Presiding.

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

"Offering obscene literature for sale"

WILLIAM L. AUSTIN and
MRS. RUTH AUSTIN, Defendants.

JUDGMENT—November 6, 1963

Commonwealth of Kentucky was represented by the County Attorney. Then came the defendants who were represented by counsel, and both parties announced ready for trial, and the prosecution being submitted to the Court, and on motion of the County Attorney, action was dismissed as to the defendant, Mrs. Ruth A. Austin.

The following jury was empaneled and accepted by the Commonwealth and defendant: Mrs. Thomas Whittemore, Paul Bowland, Raymond Wallace, Herman Graham, Dorothy Abell and Connie Neal, Jr.

Evidence was presented to both Commonwealth and defendant, and the jury was instructed as to law. The jury returned the following verdict: "The jury finds William L. Austin, guilty as charged." Punishment is fixed at a fine of $100.00 /s/ Herman Graham, Foreman of jury."

Wherefore it was adjudged by the Court that the Commonwealth of Kentucky do recover of the defendant, William L. Austin, the sum of $100.00 and costs.

[fol. 4] Roy Vance, Trial Commissioner. Approved by: Roy Stewart, Judge.

Clerk's Certificate (omitted in printing)..

[fol. 7]

IN THE MCCRACKEN CIRCUIT COURT

Criminal Action #9443

COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

WILLIAM L. AUSTIN, Defendant.

MOTION TO SET ASIDE CONVICTION AND TO DISMISS COMPLAINT—Filed February 24, 1964—Re-filed February 27, 1964

Defendant moves the court that the conviction and fine rendered against him in the McCracken County Court, which conviction and fine has been appealed to this court, be set aside and the complaint against him dismissed.

As grounds for his motion defendant states that the Kentucky Revised Statute under which he was convicted and

[File endorsement omitted]

fined, and under which the complaint against him was brought, KRS 436.100, is unconstitutional as contrary to, in conflict with, and in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States of America. As further grounds for his motion defendant states that the publications in this case are protected by the First and Fourteenth Amendments to the Constitution of the United States and moves that the complaint be dismissed as the prosecution of same contravenes the protection afforded him under the First and Fourteenth Amendments to the Constitution of the United States.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Proof of Service (omitted in printing).

[fol. 8-35]

IN THE MCCRACKEN CIRCUIT COURT

Criminal Action #9443

[Title omitted]

MOTION TO POSTPONE TRIAL—Filed February 24, 1964—Re-filed February 27, 1964

Defendant, pursuant to Rule 9.04 of the Kentucky Rules of Criminal Procedure, hereby moves the Court that the trial in this case, set for Thursday, February 27, 1964, be postponed. As grounds for his motion defendant states that the law involved in this case is in considerable uncertainty due to new rules laid down by the Supreme Court of the United States. Defendant further states that the constitutional questions involved in this case as raised by defendant's motion to dismiss the complaint in this action are important and must be extensively briefed and argued.

[File endorsement omitted]

Defendant also states that no prejudice or hardship will result to the Commonwealth of Kentucky if the trial in this case is postponed.

Defendant further states that due to personal reasons his counsel has not had an opportunity to adequately brief the questions involved.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Service Certificate (omitted in printing).

[fol. 37]

IN THE MCCRACKEN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY, Plaintiff,

VS

WILLIAM L. AUSTIN, Defendant.

Hon. C. Warren Eaton, Judge.

TRANSCRIPT OF EVIDENCE—February 27 and 28, 1964

APPEARANCES: Hon. W. Pelham McMurry and Hon. Albert Jones For the Commonwealth. Hon. Chas. A. Williams and Hon. James G. Apple For the Defendant.

[fol. 38] The transcript of the evidence given at the trial of the above-styled action held on February 27 and 28, 1964, at the McCracken County Courthouse with Honorable C. Warren Eaton, Judge of the Second Judicial District of Kentucky, presiding. The Commonwealth was represented by Hon. Albert Jones, Commonwealth's Attorney for the Second Judicial District of Kentucky, and Hon. W. Pelham McMurry, County Attorney of McCracken County, Kentucky. The defendant, William L. Austin, was represented by his counsel, Hon. Chas. A. Williams and Hon. James G.

Apple. Following selection of the jury and statement to the jury on behalf of the Commonwealth, the Defendant having reserved his statement until the end of plaintiff's evidence, testimony was presented by the Commonwealth.

It was stipulated by the parties prior to the introduction of any evidence that the defendant, William L. Austin, was the owner and operator of Readmore news stand on September 28, 1963, prior to and since that time.

The Commonwealth first called the witness, KATHERINE WATHEN, who, being duly sworn, testified as follows in response to interrogation by Mr. McMurry:

1. Please state your name and address.
[fol. 39] A. Katherine Wathen; 624 North 5th Street.

2. In Paducah, Kentucky?
A. Yes sir.

4. I will ask you if you know of an establishment known as Readmore?
A. Yes sir, I do.

5. Where is that establishment located?
A. On North Fifth Street between Kentucky Avenue and Broadway.

6. That's here in Paducah, McCracken County, Kentucky?
A. Yes sir, it is.

7. Mrs. Wathen, have you ever been in the Readmore news store?
A. Yes, I have.

8. I will ask you if you were there on the 28th day of September, 1963?
A. Yes sir, I was.

9. Just tell the jury, if you will, what you did when you got there.

A. Well, I went in and asked for four specific magazines, two of them the saleslady said they were temporarily out of, and—

Mr. Williams: We object to what the sales lady said.

The Court: Overruled.

A. She said they were out of two of them. Two of them they had and I purchased them.

10. Do you recall the names of the magazines that you purchased?

A. Yes sir, it was Spree and High Heels.

11. I hand you here a publication named High Heels, known as Volume 2, No. 6. It has been marked Exhibit 1, Commonwealth; I will ask you if you can identify that.

A. Yes sir, this is the magazine I purchased.

12. On that occasion?

[fol. 40] A. On that occasion.

13. And how much did you pay for that magazine?

A. A dollar ($1.00), plus tax, three cents tax.

Mr. McMurry: I would like for this to be admitted into evidence as Commonwealth's Exhibit No. 1.

The Court: Let it be received in evidence as a part of the testimony of this witness.

14. I hand you here a second magazine called Spree, No. 38, is the number that is on it. Do you recognize that?

A. Yes sir.

15. What magazine is that?

A. This is Spree. I also purchased this magazine for the same amount, a dollar ($1.00) plus tax.

Mr. McMurry: If you will permit me, I would like to have this marked Exhibit No. 2 for the Commonwealth.

The Court: Let the reporter mark it Exhibit 2 for the Commonwealth, and let it be received in evidence as a part of the testimony of this witness. (Exhibit so marked)

16. Mrs. Wathen, state whether or not these magazines are exactly in the same condition as they were when you purchased them.

A. They are, with the exception of at the time I purchased those magazines they were stapled together.

17. That is, staples running through the magazines so that you couldn't thumb through them?

A. That's right.

18. But outside of that they are in the same condition?

A. Yes sir.

19. Now Mrs. Wathen, what is the layout of the Readmore news stand? How is it designed?

A. Well, there are bookshelves of paper back books. [fol. 41] There are magazine racks filled with magazines, and also there are places for cards, post cards and all occasion cards, and also there are newspapers there.

20. Where were these magazines found in the store?

A. They were found on a rack behind the cashier's stand.

21. You mean to say then that there were several magazines located behind the cashier's stand?

A. Yes sir.

22. Is that stand so located that any and everybody can get back there and readily find them?

A. Well, they can see the magazines. They cannot go behind the racks themselves. They ask for the magazines by name.

23. I see. Now the other magazine racks I presume everybody can go in there and look at?

A. Yes sir.

24. And examine the magazines?

A. Yes sir.

25. And these particular magazines were segregated back behind that counter?

A. Yes sir.

26. Had you been in the Readmore news stand prior to that occasion?

A. Yes sir, I had.

27. And you have been in there since?

A. Yes, I have.

28. When did they put that rack in there that's behind the cash register counter?

A. Approximately late last summer.

29. Late or early last summer?

A. Early last summer, a year ago, in 1963.

30. Now while you were in the news stand on that occa-
[fol. 42] sion, did you see anybody there that you know?

A. Yes, I did, Mrs. Patsy McWaters was present at the time.

31. Did she see you purchase these magazines, as far as you know?

A. Yes sir, I think she did.

32. Mrs. Wathen, do you know—strike that. It has been stipulated here that Mr. Austin owned and operated Readmore news stand. Do you know who it was that waited on you on this occasion?

A. Yes, I knew that lady's name at the time. It slips my mind now.

33. What I am getting at, was it or not Mr. Austin himself?

A. No sir, it was not.

34. One of his employees then?

A. That's right.

35. All right, did she receive your money?

A. Yes sir.

36. And handed you the magazines?

A. That's right.

37. Do you know where Mr. Austin acquired those two particular magazines?

A. He got those from Basin News Company.

38. How do you know that?

A. From his testimony in the County Court.

Mr. Williams: We object to that.

The Court: Overruled.

39. You say he testified in County Court that he—

Mr. Apple: We object, your Honor. This is a trial de novo.

The Court: She can tell what he said. A statement against interest.

Mr. Williams: We move that the jury be discharged.

The Court: I will overrule the motion.

40. Mrs. Wathen, you say Mr. Austin admitted that he [fol. 43] got these two magazines from Basin News Company?

A. Yes sir.

41. Do you know who owns and operates Basin News Company?

A. Yes sir, Mr. Austin.

42. The same defendant, Mr. William L. Austin?

A. Yes sir.

43. After the purchase of these two magazines, what did you do with them?

A. I took the magazines home and read them, portions of them, practically all of it, and then I brought them to the courthouse.

44. And that's when the summons was issued in this case?

A. Yes sir.

Mr. McMurry: You may ask her.

Cross examination.

By Mr. Williams:

1x. Mrs. Wathen, you had been to Readmore news stand prior to that, prior to September 28th and looked at these two magazines, hadn't you?

A. I had been to Readmore and looked at several magazines.

2x. Among them these two?

A. I don't remember whether these two, but of this type magazine.

3x. Did you look over behind the counter?

A. At that time prior to the time I purchased these magazines, all of the magazines were out in the open. There were none behind the counter.

4x. How long was it prior to September 28th that you made your examination of Readmore news stand?

A. Back in the early summer, and I also purchased other magazines in Readmore.

[fol. 44] 5x. Now how many times had you been in Readmore and bought this type of magazine before?

A. Approximately twice.

6x. Who did you buy them for?

A. Myself.

7x. You had not seen these two magazines I take it the prior times you had been there?

A. Well, it could have been. There was a variety of magazines. I don't recall the names of all the magazines.

8x. On this occasion you just asked for four magazines by name?

A. Yes sir.

9x. And among them was Spree and High Heels?

A. Yes sir.

10x. And where did you get the names of those two magazines?

A. One of the names came from Mr. Copeland in Mayfield and the other magazine, I had seen the magazine prior to the time I had purchased it. I saw it at someone else; house, and I decided to go back and buy a newer issue to read.

11x. To read?

A. Myself.

12x. Did you buy it to read?

A. Yes, I did.

13x. How long have you been reading High Heels and Spree?

A. I have never read them before, sir.

14x. Have you read Playboy?

A. No sir, I have seen the magazine and thumbed through it, but I haven't read it through.

15x. Have you read Cavalier and Dude?

A. I have done the same thing. I have examined the magazines and read portions of them, not the complete magazines.

[fol. 45] 16x. Do you consider them the same type as these two?

A. I consider them not as bad. They are along the same line but I do not consider them as bad as these two magazines.

17x. Now as a matter of fact, you went down there just to see what type of material was being sold, didn't you, Mrs. Wathen?

A. Yes, I did.

18x. You didn't go to get books to read?

A. Well, the idea of buying a book, Mr. Williams, is to read.

19x. As a matter of fact, you had sent one of the children down there before and attempted to have them buy them, didn't you?

Mr. McMurry: Object.

A. No sir.

The Court: I will sustain the objection.

20x. I will ask you if it isn't a fact that you were furnished the names of these magazines by an organization by the name of Citizens for Decent Literature?

A. No sir.

21x. You are a Catholic, aren't you?

A. Yes, I am.

22x. And you belong to the censorship organization known as the Legion of Decency?

A. No sir, I do not.

23x. Mrs. Wathen, after you read and examined these magazines did you make at any time any complaint to Mr. Austin or to anyone in his employ about them?

A. No, I did not.

24x. Were you present at a meeting at the First Presbyterian Church that I attended and a number of ministers attended and Father Field and Mr. McMurry—(interrupted by witness).

A. Yes I was.

[fol. 46] 25x. (Continuing with Q24): In which we asked for a list that you all thought was obscene?

Mr. McMurry: I object, if the Court please. Don't answer that, Mrs. Wathen.

The Court: I am sorry, I didn't get the question.

Mr. McMurry: He is asking her if she attended some meeting after the trial down stairs where—read the question back.

The Reporter: (Reading) Were you present at a meeting at the First Presbyterian Church that I attended and

a number of ministers attended and Father Fields and Mr. McMurry in which we asked for a list of material you thought obscene?

The Court: I will sustain the objection. I don't think that is material in the trial of this case.

Mr. Williams: I would like to have her answer by way of avowal.

Avowal Answer by Witness: I don't remember whether we had a list or not. I don't recall a list being asked for.

Question by Avowal: Were you present?

Avowal Answer by Witness: Yes, I was present at that meeting.

26x. Do you know, Mrs. Wathen, whether you or anyone in your group has ever furnished to Mr. Austin or to any employee of Readmore a list of magazines or books that you consider to be obscene?

Mr. McMurry: I object. Now she is not a member of any group. She has said that.

The Court: I will sustain the objection.

Mr. Apple: This is before, this is before—

The Court: I will sustain the objection.

Mr. Williams: I will ask you to answer by way of avowal. Will you lean over here and speak to the reporter out of the [fol. 47] hearing of the jury.

Answer by Avowal: I don't know what he means by "my group".

Question by Avowal: Well, have you?

Answer by Avowal: I haven't personally.

Question by Avowal: And no one to your knowledge has?

Answer by Avowal: Has ever?

Question by Avowal: You said you don't know what I meant by your group, and you said that you had not. No one else has that you know about, is that correct?

Answer by Avowal: Yes, I do know the ministers had presented Mr. Austin with the names of some literature that they objected to.

Question by Avowal: What ministers?

Answer by Avowal: I believe they testified they did not furnish him a list.

Mr. McMurry: Well now that is just arguing with the witness. You have asked her the questions.

27x. You do know that those books were not available to be sold to minors, don't you?

Mr. McMurry: I object.

The Court: I will sustain the objection.

28x. Were there any other magazines stapled when you were in the store?

A. Yes sir, the ones behind the cashier's stand were stapled.

29x. Do you know if Life Magazine was stapled?

A. No sir. Life Magazine was not behind the cashier's stand.

30x. You were only interested in those behind the cashier's stand?

A. No sir, I observed all of the magazines in the store.

31x. Then you had never made any complaint to Mr. [fol. 48] Austin or anyone there about these magazines or any magazines, had you?

A. Personally had I?

32x. Yes ma'm.

A. No sir.

33x. You went and bought the magazines and took them home and then you went and got this woman, is that correct?

A. Yes sir.

34x. As a matter of fact, you called Mrs. McWaters and told her that you were going down there and buy these magazines and you wanted her to be there so she could see you buy them, didn't you?

A. I told her I was going to Readmore and I would like for her to be present while I was there.

35x. Did you tell her what you were going for?

A. I told her I was going to buy magazines. She had no idea about the names or nothing.

36x. She knew your purpose, didn't she?

A. Probably you will have to ask her that.

37x. You called her so she could be a witness for you in court, didn't you?

A. Yes, I did.

38x. I will ask you, you were present at the other hearing, weren't you?

A. Yes, I was.

39x. And did you not hear Mr. Austin testify that he did not know these two magazines were in his store?

A. I heard him. I didn't believe him. I heard him.

40x. Well I understand that you didn't believe him. But that is what he testified, wasn't it?

A. That is what he testified.

[fol. 49] Mr. Williams: That's right. That is all.

Redirect examination.

By Mr. McMurry.

1r. You have testified that the special rack behind the cashier's counter was put in there in the early summer of 1963. Do you know who caused it to be built and who moved the magazines off of the main racks and put them back behind the counter?

Mr. Apple: We are going to object to that. I don't see how she could know.

The Court: If she knows, she can testify.

Mr. McMurry: She heard the testimony downstairs.

Mr. Apple: But this is a trial de novo.

The Court: She is not testifying as to what another witness said.

Mr. Williams: That is what Mr. McMurry is asking her.

The Court: She cannot testify as to what she heard another witness say other than the defendant.

Mr. Williams: She can testify in rebuttal to Mr. Austin after he has testified, but she hasn't any right to testify as to this now.

The Court: I will overrule the objection, if she knows.

2r. Do you know from Mr. Austin's statements made in your presence on the occasion of the hearing downstairs why the magazines, or who moved the magazines from the regular shelves and put them back behind the counter?

A. Yes sir, he testified that there had been complaints of children reading and buying those magazines from the ministers. The ministers went to Mr. Austin and asked him to please do something about them and he removed the magazines.

3r. Go ahead.

A. Mr. Austin then proceeded to build the rack and put [fol. 50] these stapled magazines behind the cashier's stand, as well as I can remember, to my knowledge that is why the rack was made, that's who did it, Mr. Austin.

Mr. McMurry: That is all.

Recross examination.

By Mr. Williams:

1x. Just a minute, Mrs. Wathen, I have here a transcript of what was testified to below—

A. I said to my knowledge, as I remember it.

2x. Yes ma'm, you are testifying to your memory and you said there had been complaints to Mr. Austin to remove the magazines, didn't you?

A. Complaints about the magazines and children getting them.

3x. As a matter of fact, wasn't it testified that they asked him if he could do something about them so far as children

seeing them and if he didn't move them back there so children couldn't see them? Is that correct?

A. I don't remember exactly, Mr. Williams.

4x. That's right, but you are testifying exactly, aren't you, Mrs. Wathen?

A. No, I told Mr. McMurry to my knowledge and as far as I can remember that was what was said and that is what I am telling you. That's the best I can do. I don't remember perfectly word for word.

5x. All right. And you also heard Mr. Simpson testify, didn't you?

A. Yes, I heard him.

6x. And you heard Mr. Simpson testify—

Mr. McMurry: I object to any question about what Mr. Simpson testified.

[fol. 51] The Court: I will sustain the objection as to what Mr. Simpson testified to. He is not a party to this action.

7x. What other kinds of books are sold at Readmore?

A. Oh, he has some very good books. He has Bibles, best sellers and a variety of very good books, as well as this kind of magazine, and pocket novels.

8x. Do you keep up with best seller lists, Mrs. Wathen?

A. No sir, I don't.

9x. Did you ever see "Tropic of Cancer" for sale down there?

Mr. McMurry: I object.

The Court: I will sustain the objection.

10x. Do you know that that was on the best seller list?

Mr. McMurry: Object.

The Court: I will sustain the objection.

The Commonwealth then called to the stand, MRS. PATSY MCWATERS, who after being sworn, testified as follows in response to interrogation by Mr. McMurry?

1. Will you state your name and address?
A. My name is Patsy McWaters, 2323 Seneca Lane, Paducah, Ky.

2. Do you know the witness that has just left the stand, Mrs. Katherine Wathen?
A. Yes, I do.

3. I will ask you if you saw her on the 28th day of September of this year in Readmore news stand?
A. Yes sir.

4. How did you happen to be there on the same occasion?
A. She called me and asked me if I would come down to Readmore, that she would be there.

[fol. 52] 5. You knew she was going to make a purchase?
A. Yes, I did.

6. Mrs. McWaters, did you then go to Readmore news stand?
A. Yes, I did.

7. While you were there did you see Mrs. Wathen?
A. Yes, I did.

8. What did you see happen there, go on?
A. I saw Mrs. Wathen go up to the cash register and ask the sales clerk for magazines which were behind the cash register and Mrs. Wathen then purchased two magazines from the clerk at Readmore and left the store, and I saw this happen.

9. I hand you here a magazine, Exhibit No. 1 for the Commonwealth, and ask you if that is one of the magazines she purchased?
A. Yes sir.

10. And Commonwealth's Exhibit No. 2, is that also one?
A. Yes, that's one.

Mr. McMurry: I would like to pass these around and let the jury—

Mr. Williams: I object.

The Court: I think it would be best to wait until they go to the jury room. It will take some time.

Mr. McMurry: I don't want to hold up the trial or anything like that. I thought they might be thumbing through them and looking through them.

Mr. Apple: They will be listening to the testimony.

Mr. McMurry: Well, while they are listening to the testimony. They can see what is being testified about. That is up to the Court.

The Court: I believe I will wait a while. You can go ahead with your examination. We will have a recess before long.

[fol. 53] Mr. McMurry: I have no further questions.

Cross examination.

By Mr. Williams:

1x. Now you had been to the Readmore news stand a number of times?

A. Yes sir.

2x. Both before that occasion and since?

A. Yes.

3x. And you too belong to the Catholic Church?

A. Yes.

Mr. Williams: That is all.

Redirect examination.

By Mr. McMurry:

1r. Do either one of you belong to an organization known as Citizens for Decent Literature or any other organization about decent literature?

A. I do not.

Recross examination.

By Mr. Williams:

1x. But you and Mrs. Wathen have worked with Father Fields on literature—

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: I have no further questions.

The Court: At this time, ladies and gentlemen of the jury, we will have a recess. Let me admonish you not to discuss the case with anyone or permit anyone to discuss it with you. Do not discuss it among yourselves or form or express an opinion as to how it should be decided until submitted to you for that purpose. Be back in the courtroom in ten minutes.

[fol. 54] Following the recess the jury returned to their places and the Commonwealth called to the stand Rev. Herbert Simpson, who, after being sworn, testified as follows in response to questions by Mr. McMurry?

1. State your name and address to the jury, please.

A. Herbert Simpson, 2400 Jefferson, Paducah, Kentucky.

2. I believe you are a minister, are you not?

A. Right, I am pastor of the First Christian Church.

3. The First Christian Church here in Paducah?

A. In Paducah.

4. How long have you been a resident of Paducah, McCracken County, Kentucky?

A. Since January of 1961.

5. In the summer and late spring of 1963 did you hold any position with the Ministerial Association?

A. Yes sir, I was chairman of their committee on moral and social welfare.

6. And can you say which ministers in the Paducah area were members of that committee in the late spring of 1963?

A. Yes sir, Dr. Frank Brown, minister of the First Presbyterian Church, Robert Solomon, minister of Trinity Baptist Church, and C. K. Henry, who is the minister, I believe of St. James A. M. E.

7. Preacher, did your committee on social welfare—is that what you called it?

A. Moral and social welfare.

8. Moral and social welfare, have any meetings in the month of May, 1963?

A. Yes, we did, we had a meeting in the office of our [fol. 55] church. First Christian.

9. And can you say who was present outside of the ministers?

A. Yes sir, Mr. Austin and his son who is in business with him in Basin News.

10. The defendant, William L. Austin, was there?

A. Right.

11. Now was he there of his own motion and design or on the invitation of the ministers?

A. He was there by invitation.

12. Now what was the purpose of the ministers extending to him the invitation to be at that meeting?

A. We had had a meeting sometime before at which the matter of obscene literature had been discussed and presented before us, and shortly after the meeting Mr. Austin came to my office and discussed the matter with me. He was very courteous and offered to be helpful in any way he could, and I thought it would be good for him to speak to the entire committee, and so I arranged the meeting at which he and his son were present.

13. And at that time was or was not there any complaint made about the reading material on his news stand here in—the establishment known as Readmore?

A. There were complaints that had come to us as pastors through this committee of the Paducah Area Ministerial Fellowship.

Mr. Williams: I object and move that the jury be instructed not to consider that.

The Court: I think perhaps the purpose of the testimony is to show knowledge and for the purpose of showing knowledge, if it does so, I will permit the witness to answer.

14. Were the objections that you presented to Mr. Austin [fol. 56] on that occasion directed to any particular book or magazine or any class or character of magazine?

A. No, we were talking about obscene literature in general.

15. Were you talking about a particular class of magazine?

A. Yes, I guess you would describe it as these girlie magazines, this type of thing.

16. I see. I hand you two publications here that are in evidence in this trial and ask you if those are the same character and class complained of by the ministers to Mr. Austin on that occasion?

Mr. Apple: Just a minute, this is not a character or class magazine. This is on these two, isn't that right?

Mr. McMurry: No sir, you are absolutely wrong. Get your statute.

Mr. Apple: You wouldn't let us ask Mrs. Wathen about other magazines because they weren't in issue.

The Court: I will let the jury consider it for the purpose of whether or not he had knowledge of the class or character.

Mr. Apple: Note out objection.

17. Reverend Simpson, while Mr. Austin was there on that occasion state whether or not he made a statement to you regarding his own censorship of the magazines in his establishment?

A. Yes sir, he did. He indicated that there were many of this type of magazine that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults, and he had done this of his own volition to protect this type of thing from under aged people, and we appreciated this knowledge coming to us. This is why we had him before us, to see if any of this sort of thing was being done or what rules or standards he was [fol. 57] maintaining in the store.

18. Now Preacher, state whether or not you are a member of any organization for decent literature?

A. The C. D. L., Citizens for Decent Literature.

19. Are you a Catholic?

A. No sir.

Mr. McMurry: That is all.

Cross examination.

By Mr. Williams:

1x. Reverend Simpson, did you or your organization name any magazine at the time you had the meeting with Mr. Austin?

A. Not specifically. We illustrated what we were talking about by the use of two magazines.

2x. As a matter of fact, wasn't your complaint at this time the fact that you were afraid that minors would get hold of this material?

A. Not altogether. The complaints that had been given to us were from parents of minor children into whose hands this material had come. But during the meeting we were concerned with obscenity in general.

3x. How long have you belonged to the C. D. A.?

A. Within the month.

4x. Within this last month?

A. That's right.

5x. It is sponsored by the Catholic Church?

A. No, it is not. There are two groups. There is a Catholic Citizens for Decent Literature and there is Citizens for Decent Literature. I belong to the latter, which is interdenominational.

[fol. 58] 6x. Now I will ask you if Mr. Austin did not agree to withdraw from sale any magazine that you or your group would name?

A. I don't believe he said that. I believe he said for us to let him know if anything came to hand that we considered obscene to call it to his attention.

7x. I want to read a question I asked you when we tried this case before, page 39. "I will ask you if any objection was raised at that meeting or any distinction made at that meeting between the sale of that literature in question to minors or adults?" Answer: "It is my recollection that he agreed to withdraw any magazine which we would name that we found objectionable." Was that your answer at that time?

A. It is if it is in the record.

8x. I am quoting from a shorthand transcript. You remember the girl that was there and took it, don't you?

A. Yes sir.

9x. And there was a tape recorder there too?

A. That's right.

10x. Well would you say that was your answer then?

A. That was the answer as I recalled it, sir.

11x. Well, which would be true, the answer then or the answer now?

A. As I recall, he didn't make any commitment, but we were to let him know what the magazine was and he would look at it and give it his attention, this was his promise to us.

12x. Did you ever furnish him with the name of any magazine?

A. No sir, we did not.

13x. I will ask you if I didn't ask you another question: "He did agree to withdraw any magazine that you named that you found objectionable?" Answer: "That's right." That was your testimony downstairs.

[fol. 59] Mr. McMurry: He has testified to that.

14x. You were attempting to testify that what you were saying down there then was true?

A. That's right.

Mr. Williams: That's all.

Mr. McMurry: That is the case for the Commonwealth.

The Court: I would like to have a recess for a sufficient period of time to allow me to read a memorandum on a motion for a directed verdict, and while I am reading this you can let the jury see the Exhibits 1 and 2. However, it will not be necessary for the jury to make a detailed examination of them because the exhibits will be available to you at the conclusion of the arguments in this case.

At the conclusion of the Commonwealth's testimony, the defendant moved for a directed verdict of acquittal, and the Court overruled the motion.

Following a statement to the jury by Mr. Apple, the defense called the witness, the defendant, WILLIAM L. AUSTIN, who after being sworn, testified as follows in response to interrogation by Mr. Williams:

1. State your name, please sir.

A. William L. Austin.

2. Where do you live, Mr. Austin?

A. On Route 4, Paducah.

3. Where is Route 4?
A. It's in the Reidland area.

4. What street or road do you live on?
[fol. 60] A. I live on the Benton Highway.

5. Mr. Austin, how old are you?
A. I am 50 years old.

6. And what sort of family do you have?
A. I have five children, two grandchildren, and my wife.

7. Five children, two grandchildren, and your wife? What are the ages of your children? Are they all grown?
A. No, from 14 to 24.

8. Do you have any of the children at home?
A. I have two.

9. What are their ages?
A. Fourteen and 16.

10. Boys or girls?
A. A boy and a girl. The girl is 14 and the boy is 16.

11. All right, what business are you in?
A. I am in the wholesale news distribution business.

12. Are you also in the retail business?
A. Here. I am in the wholesale business separately.

13. In what areas are you in the wholesale business?
A. Well, we have a wholesale agency in Shelbyville, Tennessee, we have an agency at Nashville, Tennessee, we have an agency at Jackson, Tennessee, we have an agency at Carbondale, Illinois, and at Paducah, Kentucky.

14. Do you have any agency in Missouri?
A. We service a large part—we service Southeastern Missouri from our Paducah operation, Cape Girardeau and south of there, Poplar Bluff.

15. By that you mean you service them with what sort of materials?

A. We service all periodicals, paper back books, comic and children's items, Bibles, anything in the general appeal [fol. 61] reading field.

16. Now how long—did you start the Readmore news stand in Paducah?

A. Yes, I did.

17. And how long has that been in operation?

A. About 13 years, I believe. Approximately 13 years.

18. During that period of time, Mr. Austin—

A. Twelve years.

19. That's all right. During that period of time has the Readmore news stand been owned by you?

A. Yes, it has.

20. What do you handle in the Readmore news stand? What do you have for sale?

A. Mr. Williams, we refer to the store as Readmore because it really isn't a news stand. We have a rather large book store incorporated in the operation. We have a—

21. What kind of books do you sell? I mean by that, do you sell only paper back books?

A. Oh no, we sell hard books, I was speaking of a hard book store. We handle hard books from all major publishers. We keep the best sellers from all the better lists of best sellers, and as I testified before, I maintain it as a service to the community.

22. Mr. Austin, just answer my questions. Let's not get into what was testified before. Mr. Austin, you handle hard back books, and you handle the ones that are on the best seller lists, and the New York Times?

A. Yes.

23. And the Saturday Review?

A. No, we use the Book Sellers Guide and the Publishers Weekly, and it's a little more reliable.

[fol. 62] 24. Now what do you mean, for my benefit, hard books or paper backs?

A. The only difference, Mr. Williams, the hard book is bound with a hard cover and the paper back book is bound with a soft cover.

25. You don't mean that a hard book is rough to read or anything ilke that?

A. No sir.

26. You are talking about covers?

A. That's right.

27. What other kinds of books do you sell? Do you sell any technical books?

A. Yes, we sell technical books, and I believe I said religious books, and in our Children's Department we have many, many children's books.

28. Mr. Austin, I heard one of the jury say he had bought a mechanical or mechanics handbook, or engineering handbook?

A. Technical, yes.

29. And you handle that kind of books?

A. Yes, I do.

30. And you handle religious books?

A. Yes, we do.

31. Is your store—are you a member of any particular organization by way of books?

A. We are a member of the American Book Sellers Association, the only membership in Paducah, and we also hold a membership in the Christian Book Sellers Association.

32. A membership where?

A. In Paducah and I believe Western Kentucky too, and one might be in Owensboro.

33. Now do you sell newspapers?

[fol. 63] A. Yes, I do, daily and Sunday.

34. And you sell paper back books?

A. Yes.

35. And magazines?

A. Yes.

36. Tell us about how many volumes or how many different magazines in a month you handle at Readmore?

A. You are speaking of titles, Mr. Williams?

37. Yes sir.

A. Titles, well it varies, Mr. Williams. I would say that there is three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition.

38. In all about eleven thousand, I would say.

39. Mr. Austin, in the operation of that business or your business all over these various places, what, if anything, have you done to attempt to regulate or limit the type of literature that you dispense?

A. Mr. Williams, I mentioned to you and it has been brought out that we use the second class permit quite a bit. We feel like a magazine that don't have a second class permit maybe should be withheld from general distribution, but frankly, I can't see any difference in the ones that have and don't have.

40. You have used that as—

A. We have tried to use it as a barometer. We have not completely done so but we stay very close to that. At least we ask our publishers to recognize that.

41. I will ask you whether it would be possible for your [fol. 64] concern to economically run an outfit like Readmore and personally censor each of those ten or eleven thousand titles?

Mr. McMurry: I object.

A. It is impossible.

The Court: I will sustain the objection.

Mr. Williams: I would like for him to answer by way of avowal.

Avowal Answer: It would be almost humanly impossible to read everything we handle.

42. Does the fact that a magazine or publication has a second class mailing permit from the Post Office Department, does that mean that it has been passed or approved by the Post Office Department?

Mr. McMurry: I object to that.

The Court: I will sustain the objection.

Mr. Williams: Let me finish my question.

The Court: Well, he started to answer and I assumed that you had finished your question. You may finish your question.

43. Mr. Austin, I ask you to wait until I have finished before you start your answer. Does the fact, and don't answer this because there will be an objection, until the Court tells you what to do.

The Court: I will rule on the objections, Mr. Williams. I am not telling the witness what he can do, I am ruling on objections to the questions.

Mr. Williams: I understand. I am asking that he not try to answer until you have ruled.

44. Does the fact that a publication has the second class permit of the Post Office Department mean that that publication has been approved as far as obscenity is concerned, [fol. 65] as far as it being sent through the United States mails?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: I will ask that he answer as an avowal.

Answer by Avowal: It means the Post Office has considered it fit to be mailed at the reduced rate of second class.

45. Now they have mentioned here Playboy and Cavalier and Dude, Mr. McMurry has, in the voir dire examination of the jury—

The Court: That is not a matter that is in evidence, Mr. Williams.

Mr. Williams (continuing): It has been mentioned to the jury and they asked Mrs. Wathen about it. I will ask you whether or not those magazines have a second class mailing permit?

Mr. McMurry: I object.

A. They do.

The Court: I will sustain the objection.

Mr. Williams: Lean over and whisper your answer to the reporter as an avowal.

Answer by Avowal: Those magazines do have a second class permit I believe.

46. Mr. Austin, the two magazines that have been introduced into evidence there are—strike that question, please. What other effort, do you have any policy at Readmore as far as the sale of objectionable material is concerned?

A. I do have.

47. What is that policy?

A. I completely cooperate with any group or even individual that comes to me and expresses a complaint.

48. What do you mean by "completely cooperate?"

A. I remove from sale any publication that they feel is offensive to them or their representatives. All they have [fol. 66] to do is to advise me what they wanted taken off.

49. Did Mrs. Wathen or has any member of Citizens for Decent Literature, or has any member of the Paducah Council of Churches ever asked you to remove any publication, ever named any publication that hasn't been removed?

A. They have not. They have not up to now.

50. Have you previously or at any time a discussion was made asked them for such a list?

A. I have.

51. And to date you have never been furnished such a list?

A. To date I have never been furnished any list of guidance.

52. Mr. Austin, does the fact that a magazine does not have a second class permit mean that it has been turned down by the Post Office Department, or does it mean that it hasn't been considered by the Department—

Mr. McMurry: Object.

A. It could mean either—

Mr. Williams: Wait a minute.

The Court: I will sustain the objection.

Mr. Williams: Lean over there and whisper your answer to the reporter.

Answer by Avowal: It could mean either that they didn't apply or were refused.

53. I hand you a letter, a copy of a letter, dated February 6, 1958, and ask you whether or not that is the letter that you wrote or dictated?

A. It is.

54. And will you tell the jury who that letter is to?

A. To a gentleman by the name of Ray Kirk. He is [fol. 67] president of the Allstate News Company, Chicago, Illinois.

55. Will you examine Exhibits 1 and 2 introduced by the State, High Heels and Spree, and tell us who distributed them?

A. These are distributed by the Allstate News Company, Mr. Kirk's company.

56. By Mr. Kirk's company?

A. Yes sir.

57. All right sir, what is the date of the letter?

A. February 6, 1958.

58. Is that a copy of the letter you mailed to Mr. Kirk?

A. Yes sir.

59. Will you read that letter to the jury?

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: We offer the letter as an avowal and ask that the letter be marked Defendant's Exhibit 1 for identification.

The Court: Let it be so marked and received as an avowal.

Mr. Apple: Your Honor, may I approach the bench? (Following a conference at the bench, Mr. Williams continues).

60. Mr. Austin, these two magazines, or any of the magazines— Mrs. Wathen testified that she got two magazines from behind the counter, that they were given to her from behind the counter at your place of business on September 28, 1963, and that they were stapled. Will you tell the jury why they were stapled?

A. Glad to. It has been a policy, or was a policy of the store before these type of magazines were removed behind the counter were stapled. They were stapled because, at the suggestion of people and pastors, and people who thought they know what the community should have, that [fol. 68] these magazines would be better displayed

stapled, so we went to the expense of stapling them so no one could observe the contents of the magazines. And not only did we staple these magazines, we stapled the hot rod magazines that are bought by the younger generation; we stapled some of our picture magazines that had eye appeal but were just pictures and quickly examined, and that was the reason these magazines were stapled.

61. Mr. Austin, I hand you what has been identified as Defendant's Exhibit No. 2, and ask you what that picture represents?

A. That is the picture of the Readmore cash register counter and the display of the type magazines that are being questioned in this court today.

62. All right now, where are those magazines—does that picture show the stand we are talking about?

A. Yes, it does.

63. Why is it back there?

A. It is completely behind the register counter so that no one can examine the magazines unless they are first purchased and that limits our sales to strictly always to minors.

64. Are they for sale to minors, you mean you sell to minors?

A. No, sales to adults and limit minors.

65. You said you sold to minors.

A. I beg your pardon. No minors can ever look at the books, stapled or otherwise.

66. Is there any limit to the sales of those magazines? Do you limit it to adults only?

A. Adults only, 21 years old or over.

67. All right sir, now I will hand you Exhibit No. 3 and ask you if that is just a different view of the same thing?

A. It is just a different view.

[fol. 69] 68. So far as you know, do all of those magazines that are there have the second class—now wait to

answer this—have the second class mailing permit of the United States Post Office Department?

Mr. McMurry: I don't think that is material. I couldn't care less. Let him answer but I want him to be careful. Did he say all those had it?

Mr. Williams: He said so far as he knew, they did. I asked him—

The Witness: So far as I know they all do have.

69. Mr. Austin, I believe you said you had never had a complaint. Do I understand that the community—that you have been selling that type of magazine as pictured there for years, is that right?

A. That's right.

70. And that there has never been an objection as far as the community is concerned?

A. There has never been an objection that we didn't observe and correct and adjust.

71. Has there been any objection to any of the magazines that are there? Has anyone said "I want you to remove Cavalier—"

A. No, not by title, no sir, there has never been, not by title. That is what we wanted and asked for.

72. Mr. Austin, I will ask you whether or not the same magazines that are pictured in those photographs you have introduced as exhibits Nos. 2 and 3, whether or not they are sold in the entire area where you distribute magazines?

Mr. McMurry: I object.

A. Yes, they are.

Mr. Williams: Mr. Austin, when they object, you wait to answer.

A. Will you state the question again?

[fol. 70] The Reporter, reading: Mr. Austin, I will ask you whether or not the same magazines that are pictured

in those photographs you have introduced as exhibits Nos. 2 and 3, whether or not they are sold in the entire area where you distribute magazines?

Mr. McMurry: He is talking about these particular magazines that are pictured in the picture here.

The Court: That is why I couldn't understand the question. I didn't know what magazines he is referring to.

Mr. Williams: I am referring to Gentlemen, Cavalier, Playboy, Mister, Rogue, and Sir and Dude, among others that are there. Are all of those magazines sold in the entire area that your various news distribution agency does business?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: You may answer it quietly by whispering to the reporter.

Answer by Avowal: Yes, in general they are, but we service 300, approximately, towns, and there might be small outlets that do not handle them because of no demand.

73. Mr. Austin, I will ask you whether or not any of those magazines have been banned or restricted by any governmental authority or community or group in any of the areas that they are sold in?

Mr. McMurry: Object.

The Court: I will sustain the objection.

Mr. Williams: Answer to the reporter.

Answer by Avowal: Not to my knowledge. There has been no general restriction on the sale of these magazines.

[fol. 71] 74. Do you know whether or not the Allstate News Company is now in business?

A. No, the Allstate News Company, the publisher of those two magazines, is out of business.

75. Did it go bankrupt?

A. It went bankrupt. There was no demand for their publications.

76. Do you yourself know or did anybody ever advise you that these two magazines were on the stand?

A. They did not.

77. The two in evidence here?

A. They did not. The first I knew of it was when I received this summons, and of course, I immediately removed them.

78. Have you ever sold them since?

A. No sir.

Mr. Williams: You may ask him.

Cross examination.

By Mr. McMurry:

1x. Mr. Austin, how long have you been in the magazine selling business?

A. Since 1946, Mr. McMurry, the latter part of it.

2x. That was here at Readmore?

A. It was in Paducah. I was in the wholesale only then.

3x. I see. What was the name of that business?

A. Basin News Company.

4x. And that's the same wholesale business that you operate out on the Husbands Road here in McCracken County?

A. That's right, Mr. McMurry.

5x. How long have you operated the retail business down on Fifth Street?

[fol. 72] A. I stated 13, I believe it is 12 years. I believe it is closer to 12.

6x. And since that time you have been the owner and operator of both of those businesses?

A. Yes, I have, Mr. McMurry.

7x. Now these two publications that are in evidence here, Spree and High Heels, Mr. Austin, I presume from your testimony they came from the Allstate News Company?

A. That's right.

8x. And to what organization were they sent here in Paducah?

A. To the Basin News Company.

9x. And that is out on Husbands Road here in McCracken County?

A. That's right.

10x. And the Basin News Company is the same wholesale company you own and operate?

A. That is correct.

11x. Now after they reached the Basin News Company, what became of the magazines? Where did they go then?

A. Distribution was made on the magazines.

12x. Then the Basin News Company distributed the magazines to the various retailers?

A. That's correct.

13x. And among others, you own a retail business, Readmore?

A. That's right. I don't manage it.

14x. Then your wholesale company sent these two magazines to your retail company?

A. That would be right, Mr. McMurry.

15x. And when they reached your retail company, it was determined that they were called adult reading and placed [fol. 73] in the segregated slots behind the checkout counter?

A. That's right.

16x. Now you say you never had any complaints about titles of the magazines?

A. No by title, that's correct.

17x. You never had a complaint as to title?

A. That's right.

18. You have had a lot of complaints as to class of magazines?

A. No sir, I haven't had a lot of complaints as to class.

19x. Well, have you had complaints as to the class of the magazines?

A. In 1960 there was a complaint, not regarding that store.

20x. I understand.

A. And I was asked by the City Commissioners to meet with them to see if there was any reason for this complaint and if anything could be done about it, and I did, and they said they thought maybe around the schools that the more adult reading should not be sent there, and I cooperated and I said "I will," and I cooperated with them.

21x. Now you heard the minister testify?

A. I did, I sure did.

22x. And on that occasion, in May of 1963, the complaints were discussed involving this particular class of magazine, was it not?

A. That is correct.

23x. And you did not take it off the stand, did you?

A. That was not a complaint, as testified, it was a discussion in general as to the type of material.

24x. You knew that they objected to the sale of that material in McCracken County, didn't you?

[fol. 74] Mr. Apple: We object to any further questions about the class of magazines because you have made it a point that these two magazines are the only ones in issue, Mr. McMurry.

The Court: There has been some evidence introduced, Defendant's Exhibits 2 and 3, that show other magazines

of similar class. I think that perhaps that was in evidence and there was no objection then.

The Witness: Will you state the question again?

25x. I will ask you if on that occasion in May the ministers made you aware of the fact that they objected to the sale of that class of material in your operation here in Paducah, Kentucky?

A. Their objection was in a very general way. They didn't specify any titles, they spoke in general terms. There was one title mentioned at the time, only one.

26x. As a result of that you testified on your own you went back there and picked up some several publications and put them behind the news rack?

A. I testified, Mr. McMurry, that because of this meeting with these pastors, I noted some disturbance there. I removed those magazines to behind the counter, the cash register counter, and there would never be any question at all about adults only buying them or seeing the magazines. That's my testimony.

27x. All right now, how many titles were moved behind the counter?

A. I would say, and this would be an estimate, 25 to 30 titles.

28x. Twenty-five to 30 titles?

A. Yes sir.

29x. How long have you sold the publication known as Spree?

[fol. 75] A. I do not know.

30x. How long have you sold the publication known as High Heels?

A. Frankly, I didn't even know there was a High Heels. I had heard of Spree, but I never knew of High Heels.

31x. All the time you were buying it from an outfit up in Chicago, it was coming down to Basin News Company, which you owned and operated, and you were selling it

from Basin News Company over to the Readmore news stand, another operation of yours, and you didn't even know the magazine was in existence?

A. That is correct. We handle close to a million publications a month, Mr. McMurry, in just one operation.

32x. You just handle 25 back behind that counter?

A. We handle 25 to 30—

33x. Back behind that counter?

A. Twenty-five to 30. I said I estimated the number of titles. I couldn't name those titles either.

34x. Do you consider that these two publications are obscene?

A. I do not.

36x. You do not?

A. The magazines are poor taste, but not obscene.

37x. You have looked at them?

A. I examined them at the trial.

38x. Turn to page 58 in this Spree magazine and if you will, read to the jury the third ad on that page.

Mr. Apple: We object to that.

Mr. Williams: We object to reading any part of the magazines. He can read the whole magazine.

[fol. 76] The Court: He can ask him to read a part of it. Overruled.

Mr. McMurry: I will let him read that and I will ask him if he thinks that is obscene or not. Read it to yourself. I hate for him to read that out loud.

Mr. Williams: That is not the test.

Mr. McMurry, to the witness: I just want to know if you consider that indecent or obscene.

A. No, I don't. I consider that clinical more than anything.

39x. Mr. Austin, do you read these magazines, this kind of magazine?

A. I read Playboy magazine regularly, if you class that as this kind, and I consider this practically the same kind.

40x. I don't class that as this kind and I don't think you do. But you don't read these publications?

A. My reading time is limited.

41x. Do you allow them in your home?

A. Well, I take Playboy home. It's on our coffee table.

42x. On your coffee table? Now you have testified about the objections that were voiced at the ministerial meeting in May, 1963. I will ask you whether or not you received any objections from any of your retail outlets in McCracken County in the past several months?

Mr. Williams: We object.

The Court: I will sustain the objection. I think we are going a little too far afield. We are primarily concerned with the two magazines in question here.

43x. Let me ask you this question: Shortly after your meeting with the ministers in May of 1963, back in June or July of 1963, state whether or not you received complaints and demands to remove these girlie magazines from [fol. 77] news stands other than Readmore?

Mr. Williams: We object.

The Court: Other than Readmore?

Mr. McMurry: Yes sir, he has got a wholesale—

The Court: I will sustain the objection.

44x. Mr. Austin, as a retailer in books and magazines, do you feel that you bear any responsibility to the public as to what you sell?

Mr. Williams: We object to that question. I think it is incompetent, but he may answer. I will withdraw my objection.

The Court: Go ahead and answer.

A. I certainly do.

Mr. McMurry: That's all.

Redirect examination.

By Mr. Williams:

1r. Mr. Austin, I forgot to ask you. What is your church affiliation?

A. I am a Methodist.

2r. A Methodist? And your family?

A. Yes sir.

3r. You mentioned—Mr. McMurry brought out that you had a complaint in 1960 about magazines being near a school, which would be classified as adult reading. I will ask you to tell us what the titles of those magazines were.

A. Well, as I remember, now that's some time back, it would be Playboy was one of the primary ones, because Playboy was the best selling in the adult field.

4r. What about—was Esquire one of them?

A. Esquire was one that was objected to by the Commissioners, just one store, and we removed it from there, and there was Cavalier and probably Dude and Gent, I am [fol. 78] just naming them as their sale potential.

5r. And they were removed?

A. To the objection of the dealer. The dealer resented us taking those. It was rather high handed and we didn't like being a part of taking magazines out of his stand, because they certainly were not questionable as far as we are concerned, and they themselves didn't consider them questionable, but we did take them out of the stand.

6r. At the request of the Commissioners?

A. Yes sir, at the request of the Commissioners.

7r. Mr. Austin, in the operation of your business I believe you said you had agencies in Nashville, Shelbyville, and Jackson, and other places. Is it necessary for you to be out of town?

A. Mr. Williams, I feel that I am fortunate when I am at home 30 per cent of the time. I hope in the future to change that but now 30 per cent is the best we can do, in Paducah.

8r. And in this area?
A. Yes sir.

Mr. Williams: That's all.

At the request of the defense, the Court granted a five-minute recess.

The Court: The jury may be in recess for five minutes. The same admonition I gave before will still apply.

Upon the reconvening of court, the defendant called and had sworn the witness, CURELIA STAUDT, who testified as follows in response to questions by Mr. Apple:

1. Would you state your name, please?
[fol. 79] A. Curelia Staudt.

2. Where do you live, Mrs. Staudt?
A. At 1616 Monroe.

3. That's here in Paducah?
A. Yes sir.

4. Are you employed anywhere?
A. At Readmore.

5. How long have you been employed there?
A. It will be five years in June.

6. What are your duties at Readmore?
A. I am a clerk.

7. What hours do you work?
A. I work from 8:00 in the morning to 3:30 in the afternoon.

8. What are your general duties as a clerk at Readmore?
A. I have certain sections that I do ordering for besides being a clerk.

9. Do you work in both sections of the store, or all around the store?

A. Yes, I do.

10. Have you heard the testimony here today?

A. Yes sir.

11. Do you know where these magazines are kept which have been in evidence today, or magazines like them?

A. Yes, I do.

12. Where is that?

A. Behind the register.

13. Behind the register?

A. Yes.

14. And when were they moved behind the register?

A. I don't know exactly. It hasn't been too awfully long.

[fol. 80] 15. Do you know how they came to be moved?

A. Yes, Mr. Austin said he had some complaints of them and he wanted them moved back there so we could see who bought them.

16. Now what instructions do you have about selling those particular magazines?

A. I was instructed when I went to work there that we were not to sell them to anyone under 21 years of age.

17. Do you check all of the magazines that come into your store?

A. No, I don't. I don't put the magazines up, however I do help, if they come in and I help until time for me to go home.

18. What does that, putting up the magazines, consist of?

A. We have to check the magazines and put them on the racks.

19. Are these magazines stapled?

A. No, not now they aren't.

20. Were they ever stapled?
A. At one time they had some of them stapled.

21. What were the ones that were stapled?
A. Adult magazines and hot rod magazines and car magazines.

22. What was the reason for stapling them?
A. To keep people from reading them.

23. They would stand there and leave through them?
A. That's right.

24. And never buy them?
A. That's right.

25. When you put the magazines up on the stand, do you just take them out of the bundles and put them up there?

Mr. McMurry: Object, leading question.

26. What do you do when you put the magazines on the racks?
A. We count them and put them in the places where they are supposed to be.

[fol. 81] 27. You just count them?
A. That's right.

28. What kind of customers have you observed that buy these kind of magazines?

Mr. McMurry: I object.
The Court: Overruled.

A. Well, I haven't sold too many of them, but we have some of the better class of people in Paducah that do buy them.

29. How many women?
A. I have never sold any to a woman.

30. Mrs. Staudt, you said you work down there in the daytime?
A. Yes.

31. Do you see Mr. Austin down there much?
A. No, not too often. Mr. Austin doesn't come in much.

32. Do you know how often he does come in?
A. Well, if we see him once a week, that's about as often as Mr. Austin gets to come in.

Mr. Apple: You may ask her.

Cross examination.

By Mr. McMurry:

1x. I am sorry, I didn't get your last name.
A. Staudt.

2x. How do you spell it?
A. S-t-a-u-d-t.

3x. You are an employee there at Readmore and have been for some five years?
A. Yes sir, it will be in June.

Mr. McMurry: That is all.
Mr. Williams: Stand down.

[fol. 82] The witness, WADE SHERRILL, was then called by the defense and after being sworn testified as follows in response to questions by Mr. Williams:

1. State your name, please.
A. Wade Sherrill.

2. Where do you live?
A. 247 Clements.

3. What do you do?
A. I am a receiving clerk and general warehouse manager.

4. Receiving clerk and warehouse manager?
A. Yes sir.

5. For who?
A. Mr. Austin, Basin News Company.

6. Basin News Company?
A. Yes sir.

7. And that is out on the Husbands Road?
A. Yes sir.

8. Mr. Sherrill, what do you handle out there?
A. We handle magazines, small books, educational small books, just all types of periodicals and newspapers.

9. Do you know approximately how many different titles you handle out there?
A. Well, I would say that we receive close to a thousand different titles every month, and about a half million copies per month.

10. Now what territory does Basin News serve?
A. Missouri, Tennessee, parts of Illinois, and Kentucky.

11. How much of Kentucky do you service?
A. Well, up around the Lake, Murray, Mayfield, just the whole general area around here.

[fol. 83] 12. Mr. Sherrill, how much of the time is Mr. Austin there, present at Basin News Company?
A. Well, he is hardly ever there. We are lucky to see him every week or ten days.

13. Do you have complete authority in the warehouse?
A. Yes sir, in the warehouse.

14. Now do you have any instructions or policy so far as distributing magazines that do not have second class mailing permits?

Mr. McMurry: I object.
The Court: I will sustain the objection.
Mr. Williams: Lean over and whisper the answer to the reporter out of the hearing of the jury.

Answer by Avowal: We don't put any out that doesn't have second class mailing perimits. That is my instructions.

15. How long have you been working for Mr. Austin?
A. Approximately nine years, including after school.

16. How did you start out?
A. I started out carrying papers.

17. Carrying papers for him?
A. Yes sir.

18. Mr. Sherrill, can you tell us whether or not—and wait to answer this—can you tell us whether or not it is possible for your organization to check all of the publications you handle so far as what's in them and things of that kind?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Whisper your answer to the reporter out of the hearing of the jury.

[fol. 84] Answer by Avowal: It is impossible for us to check everything. The only thing we check now is second class mailings.

Mr. Williams: That is all.

Cross examination.

By Mr. McMurry:

1x. How long have you been warehouse manager, Mr. Sherrill?

A. I will say about a year. I am warehouse manager when Bob Austin, Mr. Austin's son, is out of town, and most of the time he is out of town here lately.

Mr. McMurry: That's all.

The defense then called and had sworn DR. C. S. LOWRY, who testified as follows in response to interrogation by Mr. Williams:

1. You are Dr. C. S. Lowry?
A. Yes sir.

2. Dr. Lowry, what education do you have?
A. I have a bachelor of arts degree, two masters of arts degrees and one PhD degree.

3. Where did you get those various degrees?
A. I got the bachelor of arts degree and one master of arts degree from Harvard University, and I took my PhD degree from the University of Kentucky after doing two years of it at Harvard.

4. Dr. Lowry, where are you now employed?
A. At Murray State College at Murray, Kentucky.

5. How long have you been so employed?
A. A little over 39½ years. It will be 40 in June.

6. Dr. Lowry, what is your position there?
[fol. 85] A. I am head of the Department of Social Science and professor.

7. Just in a brief way, what is the Department of Social Science concerned with?
A. It includes what we call the Division of History, Geography, Economics, Sociology, Political Science, and Philosophy, six divisions.

8. To summarize, we can say the Department of Social Science is all together?
A. Yes.

9. And it concerns the study of man or what makes man click?
A. Man in his social relations, including political, economic, social and cultural, and religious, yes.

10. Dr. Lowry, I will ask you if you know of any studies that have been made on the effect of so-called obscene literature on people?

Mr. McMurry: I object.

The Court: I think I will let the doctor answer. Overruled.

A. No studies that I know of have been made on that particular topic, of obscene literature. Of course we have the seduction of the innocent, which is a study made by a doctor on the effect of comic books, particularly—

11. I am not talking about comic books.

A. No detailed studies have been made.

12. There is no contention here that this magazine has been sold to anyone other than adults. Has there been anything in the adult field?

Mr. McMurry: I object to the question. It is too general.

The Court: I don't know that I understand the purpose of the question. I assume it could be considered as qualifying the witness as an expert, but I don't know that it has [fol. 86] anything to do with the offense.

13. Dr. Lowry, is there any proof or study in existence that you know of, and as such you are acquainted with studies on the behavior of man, as a general proposition?

A. Yes.

14. In your position. Is there any proof that you know about in any study that has been made that shows that girl magazines and magazines such as Playboy, any of these magazines, have any adverse effect on society as a whole?

Mr. McMurry: I object.

The Court: Overruled.

Mr. Williams: You may answer.

A. So far as I know, and I have made a very careful search, there has been no study made which establishes it to be a fact that this kind of literature has any adverse effect, and I might say, any good effect.

15. Good or bad?

A. That's right.

The Court: Is that question aimed at the individual or society? I didn't quite understand what you are talking about. Are you referring to society as a whole, Doctor?

A. Yes sir, yes sir.

The Court: And not the individual?

A. That's right. Now if I may say so, and of course you can rule me out if you want to, we have had similar studies involving other areas of conduct, but not this particular one. For example, we know—

Mr. McMurry: I object to that.

The Court: I will sustain the objection to anything unless a question is asked where the attorneys for the Com-
[fol. 87] monwealth will know what the purpose of the question is, Doctor. I will sustain the objection to comment on other lines.

16. I will ask you whether or not there is an opinion of quite a segment of people in your field of study and among the professors in the various colleges over the country and psychiatrists that magazines of the so-called girlie magazine type serve a good purpose as an outlet for some people?

Mr. McMurry: I am going to object to that.

The Court: I will sustain the objection.

Mr. Williams: Doctor, will you whisper the answer to the reporter?

Answer by Avowal: There is reason to believe that this kind of a material does have an effect to disgust one with sex.

17. Doctor, I will ask you whether or not you have at my request examined the two magazines that have been introduced in evidence, copies of the same magazines I believe, and I ask you to look at those two, Exhibits 1 and 2 of the Commonwealth, and tell us whether or not you have examined those magazines for me.

A. I have examined those two magazines, High Heels and Spree, yes sir.

18. From your examination will you tell the Court and the jury what your examination revealed in so far as High Heels is concerned?

Mr. McMurry: I object.

The Court: I will sustain the objection. That is too general, Mr. Williams. The jury can determine from its own examination what is revealed.

19. Doctor, from your examination of the magazine, High Heels, what is its general overall purpose?

Mr. McMurry: I object. I hate to make a nuisance out of [fol. 88] myself here, but—

The Court: I will let the doctor answer if he thinks he can answer what the purpose of the magazine is. Go ahead, Doctor.

A. The purpose of the magazine in my opinion is to make money, and they use sex, just like they do in selling Camel cigarettes, as a come-on.

Mr. McMurry: I will withdraw my objection.

20. Now Dr. Lowry, what is, what, in your opinion, is the overall effect of the magazine High Heels on the average person?

Mr. McMurry: I object. Let us approach the bench, your honor.

(Conference at bench.)

The Court: I will sustain the objection.

21. I will ask you from your examination of those two magazines whether or not—first, let me ask you, are you generally aware of the magazines that are sold in the area of Western Kentucky? I don't mean by title. Have you seen other magazines of similar type?

A. Yes, it is a part of my business to know these things and I am fairly aware of the types of literature that college students, in particular, read.

22. I will ask you whether or not this particular type of magazine and Playboy and Dude and Cavalier, those types of magazines, are generally sold and accepted in Kentucky, West Tennessee, Southern Illinois, the entire area?

Mr. McMurry: Just a minute, we object.

The Court: I will sustain the objection.

Mr. Williams: Doctor, whisper your answer to the reporter, please.

Answer by Avowal: This type of magazine is sold very widely in this area.

23. I will ask you if it is not a fact that this type of [fol. 89] magazine, and wait to answer, has been sold in this entire area that I asked you about for a long number of years and accepted by the various communities?

Mr. McMurry: I object.

The Court: And accepted by the various communities?

Mr. Williams: Yes sir.

The Court: I will let him answer if he can.

Mr. Williams: I mean by that, no restrictions.

The Court: I don't think you can qualify the question.

A. Yes, they have been sold and I have purchased, unfortunately, some during my—

24. What?

A. I have purchased some of these magazines.

Mr. McMurry: You added one other word there I believe, Doctor.

The Reporter: I didn't get that last word.

A. Unfortunately, it is unpleasant. That's what I mean by that.

25. Now Doctor, you said it is unpleasant. What do you mean by that?

A. I mean by that that this is cheap stuff and unpleasant, and you don't like to deal with it, but since you are responsible for directing certain people, you are supposed to know what they consume by way of vision and reading and what not.

26. Now are those magzines, do they seem then, those two there, High Heels and Spree, the publications you have examined for me, do they in any way exceed or go beyond the customary limits of candor in the community?

Mr. McMurry: I object.

27. I mean by the community the whole area of Western Kentucky.

The Court: I will let him answer.

A. My answer to that would be "no," they do not go as far as some which are generally accepted.

[fol. 90] 28. I will ask you whether or not these magazines are such, the two we are interested in here, are such as would create a desire or shameful or morbid interest in nudity or sex in the average person who might examine them?

Mr. McMurry: I object.
The Court: Overruled.
Mr. Williams: You may answer.

A. Quite the contrary, they would seem to disgust one with the whole subject of sex, they are so cheaply and poorly done.

29. Is their treatment or the pictures in those two magazines, are they any more revealing of the human body than pictures in other publications that are accepted by the various communities all over the country?

A. I would say no.

Mr. McMurry: I object.

The Court: I will sustain the objection.

The Witness: I am sorry, sir.

30. Doctor, are the stories or words that are in those magazines, and wait to answer this question, are the stories that are in those magazines any more vulgar, any more offensive than are contained in other publications that are accepted over the country?

Mr. McMurry: Object.

The Court: You haven't qualified the witness. Have you read the entire magazines?

The Witness: I have.

The Court: Cover to cover?

The Witness: Yes.

The Court: I will let him answer.

[fol. 91] A. The articles in Spree are not unsavory. As a matter of fact, you might take two of them as somewhat educational on a pretty low level. "The New Boom in White Slavery" might be factual, I don't know whether it is or not, and "I Plotted Adolph Hitler's Murder," that might be factual, I don't know, but it's not objectionable, and then a story, "Double Date," racy but not obscene, I would say.

31. Does it go any further, for example, in its description of sex than various books or publications generally accepted?

A. It doesn't go as far as the current issue of the Readers Digest, in that matter.

Mr. McMurry: I am going to object to that answer and move to exclude it.

The Court: I will sustain the objection.

32. Is there an article in the current issue of the Readers Digest on sex that you think goes further?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Whisper your answer to the reporter as an avowal.

Answer as Avowal: There is an article which goes further than any article in this number of Spree or High Heels.

Mr. Williams: You may ask him.

Cross examination.

By Mr. McMurry:

1x. Dr. Lowry, what is your particular subject that you teach there at Murray State College?

A. I don't know. Let me explain that. My major subject, of course, is in the history of political philosophy. I am the head of the Department of Social Science, and it falls [fol. 92] to me lots of times to teach in that department which no one else is qualified or courageous enough to do it. I think I would say that my principal subject at the present time is economics.

2x. What courses are you teaching at the present time?

A. I am teaching right now two courses in economics, one of them is a beginning course and the other is labor relations. I am also teaching a course now in American government. Last semester I had practically the same thing except I taught a beginning course in the field of sociology and anthropology.

3x. Sociology and anthropology?

A. Yes sir.

4x. When did you teach those?

A. Last semester and I have taught one or more sections of those for the last four or five semesters.

5x. What is the study of anthropology?

A. It is the study of the development of man's culture, that is, his customs and religions and social organizations and what not.

6x. And from the beginning of time to the present?

A. From the beginning of time to the present, yes. I teach cultural anthropology now.

7x. And you are teaching economics?

A. Teaching economics this semester, yes. We are one month in the second semester.

8x. When did you last make the rounds of the book stands in Paducah to see what was on them?

A. Readmore, and I didn't make the rounds here. The [fol. 93] last time I was in Readmore was about two weeks ago. I always go there when I come here.

9x. What is your purpose in going there?

A. To see what I can see, you know, of publications, new paper backs, and magazines and whatnot, and I am usually looking for some particular kind of a book.

10x. I see, you are a customer then of Readmore's?

A. Yes. I don't buy a lot of stuff there. I used to buy a whole lot, but my reading now is running a little away from the direction which he handles.

11x. You are reading stuff now that he doesn't even have?

A. Yes, yes.

12x. How long have you known Mr. Austin?

A. I have never met Mr. Austin until today.

13x. Never met him until today?

A. That's right.

14x. Do you know his wife?

A. No.

15x. You have been a customer down there how long?

A. Ever since he has been there. I don't know how long that has been.

16x. Would you say these magazines appeal to the prurient interest?

A. No.

17x. Well, I ask you what interest they would appeal to?

A. Curiosity, on the part of some.

18x. Now you said the magazines were published to make money out of sex.

A. No, I didn't say that.

19x. Well now, just what did you say?

[fol. 94] A. I said they use sex as a come-on to sell advertisements maybe, or something else. That is the way it is used in selling Camel cigarettes.

20x. I understand, but do you consider these books sexy then?

A. Yes, they are sexy.

Mr. Williams: Is it your contention, Mr. McMurry, that anything sexy is obscene?

Mr. McMurry: Not necessarily, Mr. Williams. Give me just a minute here. I have no further questions.

Redirect examination.

By Mr. Williams:

Mr. Doctor, I hand you six books, and I ask you to tell us whether or not those books have been sold and accepted in Western Kentucky and West Tennessee and in this whole geographical area.

Mr. McMurry: I object.

The Court: He can tell whether they have been sold or not.

Mr. Williams: Sold and accepted.

Mr. McMurry: He is saying have they been sold and accepted.

The Court: I will sustain the objection. We only have the two magazines on trial.

Mr. Williams: I merely want them in as an avowal. Will you mark these please for identification as Defendant's Exhibits 4 through 9. (Books so marked)

2r. You have examined the books as shown you as Exhibits 4 through 9, I asked you whether or not they have been accepted, the Court has ruled that you may not answer, and I will ask you to answer it by way of avowal. Whisper to the reporter.

Answer by Avowal: Those books have been sold and are [fol. 95] definitely accepted in the places with which I am familiar.

3r. Have you traveled over this geographical area?
A. Over the years, yes.

Mr. Williams: That is all.

Recross examination.

By Mr. McMurry:

1x. How long have you lived at Murray?
A. Thirty-nine and a little over a half years.

Mr. McMurry: That is all.

The defense then called and had sworn JAMES APPLE who testified as follows in response to questions by Mr. Williams:

1. You are James Apple?
A. Yes.

2. What is your profession?
A. Attorney at law.

3. With whom are you associated?
A. Mr. Charles Williams.

4. Mr. Apple, what do you have in your hand there?

A. This is a record of the case of Sunshine Book Company vs. Summerfield, a federal case.

5. I will ask you to hand it to the reporter and ask her to mark it Defendant's Exhibit No. 10. (Exhibit so marked.) Is that a record of a case tried before the Supreme Court of the United States?

A. Yes sir.

6. What type of publication was involved?

[fol. 96] Mr. McMurry: Are you going to show that to me before you—

Mr. Williams: Yes sir. (Shows exhibit to Mr. McMurry and the Court.)

Mr. McMurry: I object.

The Court: I will sustain the objection.

Mr. Williams: Will you answer by avowal?

Answer by Avowal: The type of magazine involved was Sunshine, and Health and Sun magazines and the publisher, which is Sunshine Book Company, was suing for injunction to enjoin the Post Office Department from confiscating copies of the two magazines in the exhibit. The Supreme Court of the United States sustained the injunction or granted the injunction preventing the Post Office Department from confiscating the magazines.

7. Mr. Apple, I will ask you whether or not the publication that is involved in that record was or was not more revealing of the body than either of the two publications in question here?

Mr. McMurry: I object.

The Court: I will sustain the objection.

Answer by Avowal: The magazines in question are more revealing in that they show front views of both nude males and females.

Mr. Williams: That is all.

At this time the defense called C. L. WERNER, who, after being sworn, testified as follows in response to interrogation by Mr. Williams:

1. You are Mr. C. L. Werner?
A. Yes sir.

Mr. Williams: May I approach the bench, your Honor?

[fol. 97] Following a conference at the bench, the Court announced:

The Court: Ladies and gentlemen of the jury, since this is the last witness for the defense, and as I understand it, the testimony will be taken as an avowal in the event the objections of the Commonwealth's attorneys are sustained, I am going to let the jury go and ask you to be back in the morning. Let me again admonish you not to discuss this case with anyone and do not discuss it among yourselves or form or express an opinion as to how it should be decided until it is submitted to you for that purpose. I also request and direct you not to read the newspaper account of this trial nor look at any television or radio account, if there is such, and that if anyone tries to influence you or call you in this regard I direct that you report that to the Court and do not discuss it with them. The jury is dismissed until 9:00 o'clock in the morning.

Following the withdrawal of the jury, Mr. Williams continued with the interrogation of Mr. Werner:

2. By whom are you employed, Mr. Werner?
A. By Charles Williams, attorney.

3. In what capacity?
A. Investigator.

4. Mr. Werner, I will ask you if you went to the Carnegie Library in Paducah and obtained certain books?
A. I did.

5. Will you tell the Court what books they were?
A. One publication, Masters of Modern Art—

Mr. McMurry: I object.

The Court: I will sustain the objection.

[fol. 98] Mr. Williams: You may answer by avowal.

Answer by Avowal: Masters of Modern Art, Museum of Modern Art.

Mr. Williams: Do I understand that the Commonwealth object to his testimony as to what books were obtained from the Carnegie Library?

Mr. McMurry: Yes sir, as irrelevant.

Mr. Williams: And the Court is sustaining that objection?

The Court: Yes sir, unless I announce otherwise.

6. Now what books did you obtain from the Carnegie Library?

A. Masters of Modern Art from the Museum of Modern Art, Pictures That Talk, U. S. Camera, 1959.

7. Tell us what volume it is, and so forth.

The Court: All of this is an avowal.

A. U. S. Camera, 1959, edited by Tom Maloney; a publication entitled Greek Sculpture by R. Lullies and M. Hirmer.

8. Mr. Werner, the Carnegie Library, where is it located?

A. At Ninth and Broadway, Paducah.

9. That is the public library for the City of Paducah?

A. Yes.

10. Were those books hidden or anything in the library?

A. No sir.

11. Were they available to you or to anyone of the general public?

A. As far as I know.

12. Did you make copies of pictures out of those various publications and books?

A. Yes, I did.

13. Do you have those pictures with you?
A. Yes, I do.

14. Will you take those pictures and let the reporter mark them as defendant's exhibits, and keep them in order [fol. 99] so you can identify them and tell the Court where they came from.

(Reporter marks pictures as Defendant's Exhibits 11 through 19.)

15. Mr. Werner, will you take those—have you identified those pictures yourself?
A. I have.

16. All right, tell us please where each picture came from.
A. The photograph marked 11—

17. The Defendant's Exhibit 11?
A. Defendant's Exhibit 11 is from Masters of Modern Art, page 15.

18. Go right through them.
A. The photograph marked Defendant's Exhibit 12 is from Masters of Modern Art, page 42. The photograph marked Defendant's Exhibit 13 is from Masters of Modern Art, page 44. Defendant's Exhibit 14 is a photograph of Masters of Modern Art, page 53. Defendant's Exhibit 15 is a photograph of page 105 Masters of Modern Art. Defendant's Exhibit 16 is a photograph of page 53 of Greek Sculpture. Defendant's Exhibit 17 is a photograph of page 72 of Greek Sculpture. Defendant's Exhibit 18 is a photograph of page 172 from Greek Sculpture. Defendant's Exhibit 19 is a photograph of page 138 from Pictures That Talk.

19. Mr. Werner, are those photographs which have been identified as defendant's Exhibits 11 through 19 accurate reproductions of photographs found in those books from the Carnegie Library?

A. They are.

Mr. Williams: The defendant tenders or offers those Exhibits 11 through 19 in evidence in this case.

Mr. McMurry: Object.

The Court: The objection to their offer and to all of the testimony of this witness is sustained and may be con-
[fol. 100] sidered only as an avowal.

Mr. Williams: That is the case for the defense.

The Court: We will adjourn this case until 9:00 o'clock in the morning. The same admonition I gave before will still apply.

Court reconvened on the following day, February 28, 1964, and by agreement of the parties the defense recalled the Defendant, WILLIAM L. AUSTIN, who testified as follows in response to interrogation by Mr. Williams, the jury being in the courtroom:

1. Mr. Austin, on yesterday you testified about the Allstate Company, I believe. You said that was the company that distributed the two magazines in question here to you, is that right?

A. That's right.

2. How many other companies of that nature does the Basin News Company do business with?

A. Well, of any nature, about twelve to fourteen companies, with approximately one thousand titles a month.

3. How is that done? Does Basin News, do they order certain magazines, or do the publishers and distributors ship them to you without ordering?

A. Mr. Williams, we have a blanket contract with these companies, we sign that, because it would be impossible for them to send us every publication and every book and ask us to review it and then give an order. We have a blanket arrangement with them and they ship us anything they happen to distribute or publish, and we never

set our order, we don't tell them how many to send us, or how few to send us. They use their own judgment on fig-[fol. 101] ures and statistics they have for the order that they will send us. We never order a publication, it is automatically sent to us under blanket contract.

4. Are you the only distributor of magazines in Paducah?

Mr. McMurry: Object.
The Court: Overruled.

A. No, I am not, Mr. Williams, there is another distributor working out of Earlington, Kentucky, that distributes in Paducah.

Cross examination.

By Mr. McMurry:

1x. State whether or not on November 11th, 1963, you addressed a letter to your retail dealers advising them that they did not have to take magazines off the stand that you mailed to them or that you distributed to them.

Mr. Williams: We object to that.
The Court: November the 11th? I will sustain the objection.
Mr. McMurry: No further questions.
Mr. Williams: That is all.

Rebuttal testimony.

By the Commonwealth:

The Commonwealth then called FREDERICK G. SCHLAFER, who, after being sworn, testified as follows in response to questions by Mr. McMurry:

1. State your name and address to the reporter, please.
A. Frederick G. Schlafer, 2800 Broadway, Paducah.

2. What is your profession?

A. I am the pastor of the Baptist Tabernacle here in Paducah.

3. Dr. Schlafer, what formal education do you have? [fol. 102] A. I have a bachelor's degree with a major in English and social science, a double major.

4. From what university?

A. From Houghton College, Houghton, New York. I have a master's degree with a major in Biblical studies and pastoral work at the Southern Baptist Seminary, Louisville, Kentucky, and then my doctor's degree is with a major in theology, a minor in sociology and missions, from the Louisville Seminary.

5. How long have you been a minister?

A. Since the last year of college, 1938.

6. You testified you live here in Paducah. How long have you lived in Paducah?

A. A total of five and a half years in two different periods. We came to Paducah originally in 1952 and were living here until 1954, moved to Birmingham, and returned in 1960 and have been living here since September '60 to the present.

7. Now Dr. Schlafer, as a part of your studies and work, have you made a study of the moral and social behavior of people?

A. Yes sir, this is one of my majors in college and I followed up with a minor in seminary. Of course, in my entire work I deal with people, social standards, moral standards, spiritual standards.

8. As a part of your study and your work, have you become acquainted with the people of this community, a cross section, the average person?

A. I have become acquainted with many people, and I

would say that I have become acquainted with the types of people that are in Paducah, not all of them individually.

9. I understand. Now as relates to reading material gen- [fol. 103] erally do you feel that you know the standards, contemporary standards of this community?

A. Yes sir, I do.

10. Have you examined the two books in this case, Spree and High Heels, on the reporter's desk there?

A. Yes sir, within the last 24 hours I have looked at them.

11. I will ask you, Doctor, whether or not in your opinion these two publications, using the contemporary community standards, would appeal to the prurient interest of the average person, prurient interest being a leaning toward the lewd?

Mr. Apple: Now that is not a definition of prurient interest.

Mr. McMurry: All right, a longing for something lewd or lecherous.

A. Yes sir, very definitely, both of them.

Mr. Williams: We object and move that be excluded.

The Court: I will overrule the objection and consider the testimony as being in rebuttal to the testimony of Dr. Lowry, for the defendant.

12. Doctor, will you say whether or not, using contemporary community standards, these particular magazines are obscene or indecent?

A. They are both obscene and indecedent. They appeal basically to the baser nature of man and they cheapen womanhood. They are detrimental from the standpoint of degrading something that God intended to be holy and sacred and beautiful in a right context.

13. Dr. Schlafer, the defense produced an economics professor from Murray State College here yesterday, Dr.

Lowry, who testified that as far as he knew no study had [fol. 104] been made of obscene literature in its effect on people. I will ask you if you know of any such study.

A. Yes sir, there have been a number of studies made, through Congress and our own state government.

Mr. McMurry: You may ask him.

Cross examination.

By Mr. Williams:

1x. Who made those studies?

A. I have reference to several of them here. In 1956 a Senate subcommittee investigated obscene literature and crime, a five hundred million dollar racket.

2x. Now we are talking about obscene literature and its effect on people. You are talking about a five hundred million dollar racket. They are different things, aren't they?

A. No. The reason it was investigated was that it was having an ill effect on people. If there had been no ill effect on people, there would be no statute.

3x. Are you acquainted with the study that was made of pre-marital—or children born to persons married in Utah, that were born or conceived prior to marriage and born after marriage? Are you aware of that study?

A. No, I am not acquainted with that one. I am acquainted with the fact that in Mayfield it was discovered that this type of literature—

Mr. Williams: We object to what happened in Mayfield.

The Court: I will sustain the objection.

4x. Doctor, now you say you have looked at those two magazines. Are you acquainted with Playboy and Cavalier and Dude?

A. I have seen some issues of Playboy.

5x. Have you ever seen Cavalier or Dude?

[fol. 105] A. I don't believe I have examined them.

6x. Do you know how extensively Cavalier and Dude and Playboy are read in this community?

A. I wouldn't know their circulation, Mr. Williams.

7x. You do know what they are?

A. Yes sir, they are on the news stands.

8x. They are similar magazines to these?

A. No, there is quite a contrast, I would say.

9x. How can you say that? You said you had seen one issue of Playboy.

Mr. McMurry: He didn't say that.

A. I said I had examined issues of Playboy.

10x. Well now they have nude women in them too, don't they?

A. Yes sir.

11x. As a matter of fact, there is no picture in either one of those magazines involved that shows a frontal view of any nude person, is there?

A. Not completely.

12x. Right. There is no view that shows the pubic area of any person, is there?

A. In part.

13x. I will ask you to show us where there is any pubic area shown in either of these magazines.

A. Here in this picture (indicating).

14x. It is your opinion that that picture shows the pubic area of that person, is that right?

A. A portion of it.

15x. Now that is a picture of a burleque dancer, isn't it?

A. Well, the picture says, "The burlesque is dead."

16x. Well, that is the caption, but that is what the picture [fol. 106] purports to present, isn't it.

A. I am not prepared to say that.

17x. You have never been to a burlesque show, have you, Doctor?

A. No, I have not.

18x. As a matter of fact, you do not read or examine that type material, do you, ordinarily?

A. Not regularly.

19x. As a matter of fact, you—are you acquainted or have you visited any news stands in this area and examined the material that is on the news stands?

A. Oh yes sir.

20x. Have you?

A. Yes.

21x. Then you know that Playboy and Dude and Cavalier and that type of magazine are sold generally all over the community?

A. There is quite a difference between Playboy and this type of magazine though.

22x. There is not difference in the amount of the body that is displayed, is there?

A. There is a great deal of difference from the standpoint of the amount of material that is objectionable.

23x. Oh you complained about the amount, not the amount of the body that is displayed? There is no more of the body displayed in these magazines than there is in Playboy, is there?

A. I am not concerned mainly about the pictures, Mr. Williams, but the reading material in these two magazines, particularly Spree.

24x. All right, take the reading material. Are there any four-letter words in the reading material, I mean vulgar words in the reading material in Spree?

[fol. 107] A. I would say from the standpoint of emphasis that is given to abnormal and immoral relations, this is true in Spree.

25x. Have you read the article on the sex knowledge of married couples in the most recent issue of Readers Digest?

A. No sir.

26x. Are you aware that that discusses sex—

Mr. McMurry: If the Court please, he has testified that he hasn't read it, and he would not be aware—

The Court: I will sustain the objection.

27x. Doctor, have you read or are you acquainted with the best selling books in this community and all over the country?

A. What titles are you referring to?

28x. Well, I refer to "Tropic of Cancer" for one, have you seen that?

A. I have seen it on the stand.

29x. You have never examined it?

A. No sir. However, the fact that it is on the stand doesn't mean that it is good to read.

30x. We are not talking about what's good to read, Doctor, under our law. We are talking about what is tolerated by the communities and by the country as a whole. But I will ask you if in that book and if in many of the books that are published and freely distributed all over this country there are not many four-letter words—

Mr. McMurry: Object.

Mr. Williams, continuing: that are vulgar and offensive to you and to me and to anybody else?

Mr. McMurry: Object.

The Court: I will let him answer if he can.

31x. Are they not?

[fol. 108] A. Very likely are.

32x. But there are no such words in those magazines, are there?

A. I would not say those words are not, because I haven't read every word in the magazines.

33x. But you didn't find any in your 24 hour—I mean examination you made in the last 24 hours?

A. I haven't found specific four-letter words but I have found suggestive material.

34x. You have found vivid descriptions, haven't you?

A. Yes sir.

35x. And there are vivid descriptions in the Decameron Tales of Boccaccio, aren't there? Have you ever read those?

A. No sir.

36x. That's an old classic, isn't it, and been in existence hundreds of years, and it is in all the libraries? Don't you know that is true, Doctor?

A. That's an old book.

37x. It's an old classic too, isn't it?

No answer by witness.

38x. Are you familiar with the best selling book called "Peyton Place"?

A. No, I am not, sir.

39x. Doctor, are you familiar with the book called "Carpet Baggers"?

A. I know the title, I am not familiar with the contents.

40x. You have not read that book either?

A. No.

41x. Do you know that that was a recent best seller all over the country?

A. I do not know that.

[fol. 109] 42x. You don't know that that book has—

Mr. McMurry: Now I object. He says he didn't know.

The Court: I will sustain the objection.

43x. As a matter of fact, Doctor, isn't it true that there are many books that are classified by the universities as classics that have detailed descriptions of the sexual act?

Mr. McMurry: I object.
The Court: I will let him answer.

A. I haven't read them, Mr. Williams.

44x. You haven't read them?
A. No sir.

45x. But you know that they are?
A. I know that there are books available of this nature.

46x. You know that they are in Carnegie Library and in university libraries all over this country?
A. But the entire content of the book or magazine is not of the nature of Spree. On—

47x. I understand that—

Mr. McMurry: Let him answer.

A. On practically every page there is something offensive to the moral man or woman.

48x. I believe that Webster's definition of prurient is a person who has a morbid or lascivious longings or desires. That wouldn't be an immoral man, would it?
A. It very well could be, sir.

49x. As a matter of fact, Doctor, those two magazines would not excite your sexual desires, would they?

Mr. McMurry: Object.
The Court: I will sustain the objection.

[fol. 110] 50x. I will ask you, Doctor, if those magazines would not make you want—be repulsive to you as far as sex is concerned?

Mr. McMurry: I object.
The Court: You said might be repulsive?
Mr. Williams: Yes.
The Court: I will let him go ahead and answer.

A. Yes, it's repulsive, very definitely.

51x. You are a minister?
A. Yes sir.

52x. That is your profession?
A. Right.

53x. I will ask you whether the description or the stories in that are any worse or any more offensive than that which appears in the 19th chapter of Genesis?
A. Yes sir, I would say they are, very definitely.

54x. Where Lot's two daughters became pregnant by him got him drunk and went to bed with him. That is pretty vivid, isn't it?
A. I have already answered that question, sir. These magazines are worse than anything I have ever read in the Scriptures. In the Scriptures this act is not glorified.

55x. Doctor, I understand, you are not only a witness here, but you are an advocate, helping Mr. McMurry and Mr. Jones prosecute this case.

Mr. McMurry: I object.
The Court: I will sustain the objection.
Mr. Williams: That's all.
Mr. McMurry: That's all, Doctor.

The Commonwealth then introduced and had sworn [fol. 111] ALBERT JONES, who, after being sworn, testified as follows in response to interrogation by Mr. McMurry:

1. State your name.
A. Albert Jones.

2. Mr. Jones, what official position do you hold in McCracken County?
A. Commonwealth Attorney of the Second Judicial District.

3. Mr. Jones, what was your profession before you came back to Paducah to practice law?

A. Special agent, Federal Bureau of Investigation.

4. How long were you an agent of the FBI?

A. Two years.

5. What does it take to become an agent of the FBI?

A. A law degree and certain physical qualifications and I suspect passing an examination, that is, loyal and character matters, such as that.

6. After you passed those examinations, were you given any training?

A. Yes sir, three months.

7. And after your three months training you served as an agent some two years?

A. Yes sir.

8. What degrees do you hold?

A. LL.B. from the University of Kentucky.

9. That's a law degree?

A. Yes sir.

10. Mr. Jones, Dr. Lowry testified here yesterday that there were no studies made on obscene literature in relation to the behavior of man. Is that statement accurate or not?

[fol. 112] A. That statement was not accurate.

11. Do you know of any such studies?

A. Yes sir.

Mr. McMurry: You may ask him.

Cross examination.

By Mr. Williams:

1x. You are assisting in the prosecution of this case, are you not?

A. That's correct. As Commonwealth Attorney it is part of my duties. Mr. McMurry as County Attorney has conducted the prosecution.

Mr. Williams: That is all.
Mr. McMurry: That's the case.

The Court read his instructions to the jury following which the arguments of counsel were presented. The argument for the defendant given by Mr. Williams, follows:

May it please the Court, Mr. McMurry, Mr. Jones, and may it please you, ladies and gentlemen of the jury, I don't know when any jury in McCracken County has been called upon to sit upon a more important case. This case is important because of the difficulty in which the defendant finds himself. It is important because of the difficult situation of defending something that to us is repulsive rather than attractive so far as exciting any prurient or lewd or lascivious desire. I don't believe any normal, average person can read or examine these magazines and have their sexual desires aroused. Mr. McMurry examined you on voir dire examination and we did too about whether you read or were acquainted with Cavalier or Dude or Playboy as being [fol. 113] similar magazines, and we accept that challenge. Those are magazines that are sold and maybe—I am sure Reverend Simpson or Reverend Schlafer, or there isn't a preacher in Paducah, if they had their way, that would permit that sort of magazine to be sold in the community. I am equally sure that if in this country we turn over to one group of people, whether they may be ministers or not, and while it may be desired that we turn it over to the ministers, I don't believe that that is the way the Constitution of this country was written, that it was to be turned over to any particular group. For example, Mr. Austin has down there in his store Bibles, he has Catholic Bibles and Protestant Bibles. If the Catholics had their way,

there would be no Protestant Bibles, and very probably if we Protestants had our way, there would be no Catholic Bibles.

Now, we are not talking about what is good or bad for the community. I will admit to you that there may be in this country material on the news stands and in the movies and elsewhere that isn't good. But just as the Decameron Tales of Boccaccio, which are hundreds of years old and on the library shelves of every university and every creditable library in the country, are offensive to a moral person who reads them. We do not live in a vacuum, and we have come a long way, whether it is progress or not, I won't debate it, but we do, we discuss sex, for example, much more openly than we ever used to. There was a time when it was a crime for a woman to appear on a beach with any part of her torso exposed. The bathing suits had to be down to her knees and the tops had to be down to her [fol. 114] elbows. But you all know how we would laugh at such a woman who appeared on the beach today.

But let us think further for a few moments. Mr. McMurry is going to read to you, I am sure, from the magazines some of the ads. The only thing I have got to say about the ads is that every one of them gives an address, every one of them is going to mail that material to whomever orders it, every one of them is going through the United States mail if it were pornographic literature or obscene literature.

Now I asked Dr. Schlafer to find some of the four-letter words. Personally, I have never understood why writers who want to describe the sex act, who want to describe something else about us that isn't usually discussed, but in some of the books that are supposed to be best sellers in this country and are recognized as good literature for some reason or other by the country, those people who are critics and are supposed to know, as presenting the realistic side of life, but there appear what we call four-letter words, vulgar words that I wouldn't repeat to you. You

know what we are talking about. Those words are not in these magazines, in either of them. They are in many best sellers today.

Now the Court has instructed you as to whether or not these magazines go substantially beyond the customary limits of candor in description or representation of such matters. In other words, you heard me ask these people whether or not these pictures when [sic] beyond the customary limits of candor, whether they show more of the body than pictures in other magazines and other publications. I am sure that all of you have seen pictures of completely [fol. 115] nude bodies in photographic magazines. I am not trying to argue whether it is morally right or morally wrong. We are talking about what is guaranteed under free speech in this country and freedom of the press. We are talking about who is going to say, who is going to limit this matter, and what standards can Mr. Austin in his business apply. Which ones would you take off? Those other magazines have a second class permit and have been approved by the Postal Department. They are the same type magazines, just as revealing in their pictures, just as desultory and just as descriptive in their stories.

The Commonwealth didn't produce any witness who said that these magazines were—he said yes, in his opinion they were worse, but he didn't testify that they revealed any more of the body. He didn't testify that the stories had any vulgar or profane words in them, and you and I know that much of the literature today has vulgar and profane words in the cause of realism, and you and I know in spite of all the preachers have attempted to do, and all of us who belong to churches have attempted to help them, we all know that that realism exists. We all know that people engage in those kinds of acts. That is what we are talking about here today, whether we are going to say, "Let us sweep it under the rug and try to turn our heads and say it doesn't exist," or are we going to say that this type of thing, if we are going to stop it, we are going to stop it all.

It isn't going to be, it must not, you have got to stay within the limits of what the ministers say. Why not set up and [fol. 116] establish a censorship board, or somebody who can tell a man what he shall or shall not read. Mr. Austin runs a public business. It is available down there to those who want something. Mechanical engineers want that type of book. I wouldn't give anything for that type of book. If he had some law books I might be interested in those. There are various things: It has to be, for a cross section of the community. There are over eleven thousand titles in that place.

What is the—the Court has instructed you if you find beyond a reasonable doubt that the magazines named in the complaint, applying contemporary community standards, that's not your standard or mine, or what we like, and if you vote for an acquittal here today that doesn't say that you like that kind of literature or that you approve of it at all. It doesn't say that you would want to read it or have it in your home. It just says that in your opinion it doesn't go beyond the contemporary standards of this whole country, what other magazines like them have in them. That would be what your decision would be. Does it appeal to the prurient interest of the average person. If you believe—if you think, if these magazines appeal to you, that they arouse any desire in you, then you bring back a verdict of guilty in this case. I don't believe this jury can say that either of these magazines appeal to any prurient interest of this jury.

The Court has instructed you, though we attempted to prove standards over the country, the Court has instructed that you have got to measure this thing on the country as a whole, not Paducah, not what is good for this community. Certainly if that were true, there would be an impossible situation. What would be permissible in May- [fol. 117] field wouldn't be permissible in Paducah, or wouldn't be permissible over in Smithland and various things of that kind. Certainly free speech and free press

can't be halted or hampered by any such thing as this. Now, in other words, do these publications go substantially, not just a little bit, but do they go substantially beyond the customary limits of candor of the country as a whole? There are pictures of burlesque shows. There are burlesque shows in every large city of this country. I didn't argue with you that they were good. I have never been to one. I don't know what they are, but I have seen the signs, I have seen the advertisements in newspapers when I have been in cities. They are there. It is a part of the contemporary standards of their country or their community as a whole, or the country as a whole. It is a part of the free speech and the free press of this country guaranteed by the Constitution, the First Amendment of the Constitution of the United States, part of the Bill of Rights that we are so fond of.

Now, let me talk to you just a minute. There isn't a word of proof in this case that Mr. Austin knew that these two magazines were down there. One of the things in the first instruction is that Mr. Austin knowingly had these magazines for sale. It is true, he had them, lots of magazines, eleven thousand titles down there for sale. But the burden is on the Commonwealth to show that this man—now how could they have done it? They could have done it very easily. Mrs. Wathen could have gone to Mr. Austin or to the woman from whom she bought them after she had looked at them and she could have said, "This magazine is offensive, obscene. I brought it to the County Attorney and he said it was obscene." Mr. Austin would have taken [fol. 118] it off of the stands, and they knew that. But no, they didn't want to do that, they wanted to prosecute him. They didn't want to give him a chance to get it off. They wanted to complain about it. They wanted the publicity. They want to make a show of it, to come into court, and cause this man, who is a respected business man in our community, to have to employ lawyers, to have to defend himself as a common criminal, never having been in court

before in his life, because they were unwilling to give him a chance. You have heard all this discussion about what is and what isn't obscene and objectionable and so forth. If it is that difficult for the experts, how can you expect a common, ordinary business man to know? How can we demand more of him? They didn't want him to know. Mrs. Wathen—it is more than passingly peculiar that she went to that news stand and asked for four magazines by name. She didn't tell you where she got the names or who insructed her to get the magazines. It doesn't matter. But it does matter that she didn't go back and call these magazines to his attention. It wouldn't have cost her anything. She wouldn't have been embarrassed. If he hadn't have taken them off of the stand then, she could have come here and testified that she asked him to remove them and he didn't do it. Then he would have known, then he would have known they were there. For even though you may find that these magazines are all that they say they are, the Court has instructed you that you must also find that Mr. Austin knew that they were there. He deserves—he deserves—what better—how many business men would say to his customers, "You tell me what is offensive to you and I will take it out of my store.?" I don't know of any. That man has eleven thousand titles down there and he [fol. 119] said it, and he said it to the preachers. Brother Simpson on cross-examination yesterday, although I had to tear it out of him, finally admitted that Mr. Austin told them that, and he finally admitted that they told Mr. Austin that they would give him a list, and he finally admitted that they never furnished him such a list, then or ever, or even up to now.

I am talking about not only the First Amendment to the Constitution of the United States, ladies and gentlemen, but I am talking about fair play. I am talking about fair play for a business man, an honorable business man of this community that deserves to have the preachers, if you please, do what they say they will do, no more. And they

should have furnished him one. Had they have furnished such a list, had they have done that, then they could have come in here and said "Mr. Austin, you were furnished a list and you didn't take it off," if there had been any debate about it. There isn't a preacher in this community that I don't respect, but I don't have to agree with the actions of all of them. And ladies and gentlemen, this is the last argument we can make here in this community about this case. Mr. Austin could have paid a fine and been through with this case a long time ago, but he didn't feel that he was guilty. Mr. Austin wants a verdict of acquittal that will say to the community that the standards of fair play in this community are higher than that. You can say to these people, "This is offensive to me," call it to his attention and let him know.

Ladies and gentlemen of the jury, I realize that I don't stand here pleading any popular cause when I am talking [fol. 120] about this type of publication, but I am talking about a larger thing than these two magazines. I am talking about the First amendment to the Constitution of the United States, and it is never tested, it is never tested by the good books. It's never tested by the honorable statements of speech. It's never tested by the pleasing statements that people make. Freedom of speech isn't ever challenged or isn't ever tested so long as you are pleasing the government that is in power, for example. It isn't ever tested when we are doing the things that please people. It is only tested by things that are not the good, not the pleasing in speech or press in public.

Peter Zengler who was tried in New York years ago for his publication, the New York Journal, and incidentally, his lawyers were put in jail because they defended him because he had some critical things to say in the magazine or newspaper about the government, yet a jury of twelve people returned a verdict of not guilty in that case. It was an unpopular verdict, but that jury and that man's name has stood in history to this day and it has been an

example of the preservation of the right of free speech and free press in this country. That is all we ask of you in this case. You don't have to explain how you reached your verdict of acquittal, but there are any number of reasons why you should return such verdict, No. 1, that you believe in that First Amendment to the Constitution of the United States; No. 2, that Mr. Austin did not know. There has been no proof and the burden of proof is on the Commonwealth to prove that he knew, read those instructions, that he knew the magazines were there; and that while these magazines may be offensive to you, Mr. [fol. 121] Austin is not guilty of committing any crime, and your verdict of not guilty will also say that these magazines do not appeal to any interest that you ladies and gentlemen have, and that you believe that Mr. Austin is an honorable business man in this community and is entitled to a verdict of not guilty at the hands of this jury, and I ask that of you.

At the close of the foregoing argument the Court recognized Mr. McMurry who gave the following argument on behalf of the Commonwealth:

May it please the Court, Mr. Williams, Mr. Apple, and Ladies and Gentlemen of the Jury, you have been mighty patient to sit here and listen to this quibbling and growling back and forth for these two days. As Mr. Williams said, this is an important case. It is not a murder case, it is not a case of breaking and entering and that kind of thing that you are used to listening to. In my opinion, it is worse. I like the way Dr. Lowry put it, sex for the sake of money, dirt for dirt. I have heard that same expression used in dope cases and selling whiskey to minors.

Mr. Williams: I object to that. There is no question about minors in this case.

The Court: The jury can consider what the statement—

Mr. McMurry: Now I didn't bother him.

The Court: He is entitled to have a reasonable argument, Mr. Williams.

Mr. McMurry: (Continuing) Mr. Austin comes in here with two defenses. First, why these magazines aren't ob-
[fol. 122] scene. They are not indecent. "But oh, maybe if they are, I didn't know they were there." I want to cover all of these points if I can and try to let you see through this web that has been spread before this jury.

In the first place, I don't hold Mrs. Katherine Wathen out as the censor of McCracken County. She is not. Neither are the ministers the censors of McCracken County, and they have got no obligation to any person to go out and censor the reading material that is on the stands in Paducah. They recognize that fact. That's a dangerous situation. But what did they do? They had a meeting, two meetings, as I recall the testimony, the last one in May of 1963, and the objection on the part of the ministers was all of the material that he called "adult reading." They objected to all of it. They weren't going to specify this issue, that issue, or some other issue. They told him that they objected to all of it, as they should. Why if they had told him they objected to the May issue of Playboy Magazine, all he would have had to do was to put those under the shelves down there, but then the June issue would be out. And that's what he wants them to do. He wants them to specify this magazine and this issue, that magazine and that issue, because there will be a new one out next month. That's exactly what he wants the ministers to do. But they told him they objected to anything he has got down there that is obscene, and in their opinion, this adult reading is obscene.

Mr. Williams: Now we object to that. There has been no proof that in their opinion the adult magazines are obscene.

[fol. 123] The Court: Mr. McMurry is entitled to argue his case without unnecessary objections.

Mr. Williams: Note our objections (To reporter).

The Court: I will let the jury consider it as being the argument of Mr. McMurry. They will have to base their

verdict upon the testimony they have heard in the case and from the exhibits which have been filed.

Mr. McMurry: (Continuing) Mr. Austin has said that he didn't have any knowledge that these two magazines were in there. He acknowledged the fact that he wrote the publisher and ordered the magazines.

Mr. Williams: Now it's not so, and your Honor, you wouldn't even let us introduce the letter and let him read the letter.

Mr. McMurry: He can testify that he wrote them in 1958 and ordered the magazines.

Mr. Williams: And the Court wouldn't permit him to read that letter that told what kind of magazines not to send.

The Court: I will not let you comment on the contents of the letter because the letter is not in evidence.

Mr. Williams: He said he wrote them and ordered the magazines. Now that's not so and there is no word of proof in this case to that effect.

The Court: I don't recall that that was the proof and I will leave that to the jury because I can't recall that it is or isn't.

Mr. McMurry: In any event, the magazines showed up here, and where did they go? They went out to operation [fol. 124] No. 1, out on the Husbands Road, Basin News Company. Who owns Basin News? William L. Austin. He has an operation out there and from that wholesale operation he distributes magazines to various retailers. There's his first shot at finding them, is out there at that business. Where did it next go? To his retail store down on Fifth Street. There he had shot No. 2 to find it. And don't you know that he knew it was there, because after the meeting with the ministers in May, he goes down there and gathers up all these girlie books, including these two, and puts them in a segregated counter behind the checkout stand, some 25 magazines. He says, "I handle eleven thousand titles." He segregated 25 of those eleven thousand and put them back behind the stand, and it bears to be remembered that any

business man ought to know what 25 titles he has segregated from the rest.

What else did he do? He stapled them put the staples in them, as well as segregating them. He had knowledge that the magazines were there, but he says, "Oh no, I am there one day a week, I am out here at Basin News one day a week." Where is he the other five days? "Just let the business run helter-skelter, let the chips fall where they may. We don't care how much we pollute Paducah or McCracken County. The business will run itself, I am off, gone." That's no defense, absolutely none.

Now Mr. Williams has alluded to the First Amendment of our Constitution, our basic freedom. And let me establish it at this early date and now, that I am as much in favor of our basic freedoms and the preservation of them as any man or woman here, and I am fully cognizant of the fact that the First Amendment of our Constitution that [fol. 125] guarantees freedom of speech, freedom of press and expression is a God-given basic American freedom. I know that many of you in this last war and other wars have fought foreign powers that would destroy that basic American freedom, and many of your loved ones perhaps gave their lives in the war. I myself lost a brother in that war and I am perfectly willing to say that I know he didn't die in vain fighting for our freedoms. Our basic American freedoms come from the Constitutional Convention of 1786, and there gathered a group of men wise beyond their years and certainly inspired by the Almighty, and set forth on paper a document that is without equal, so far as an outline of government is concerned, and those men realized that freedom ends for one person where the right of another commences, that you can't have, you just can't have freedom of movement, freedom of speech, freedom of everything, without any restrictions. They realized that. Complete freedom in that sense is simply license, and license brings on chaos and disorder. Yes, even the Supreme Court of the United States in a recent case in 1956, Roth vs. U. S., stated that implicit in the history of the First

Amendment is the rejection of the obscene or indecent as utterly without redeeming importance, and that, ladies and gentlemen, is law. You haven't got a right to go out and sell anything you want to and say you have got the freedom to do it. You haven't got the right to go out and say anything you want to and hide behind the First Amendment. If we could do that, then I could go out here and slander any member of this jury, or you could write a letter slandering your friends or your neighbors. We don't have that right. Why? Because a true democracy as ours is [fol. 126] laid out and constituted is based on laws. You have got to have laws to govern people. And that's what we are talking about here this morning. A law passed by the Legislature of Kentucky. Is there anything strange about that? We have got thousands of them. Every state in this Union has a law against the sale and distribution of obscene literature, and over 20 laws have been passed by the Federal Government on the subject, and there is an international agreement between some 50 nations as to the traffic of this trash between countries. There is nothing unusual about it, and cases like this are tried every day, every day. There is nothing unusual about it.

Now that's what we have here on law. The question is, did this man violate this law? Are these books obscene? Now you have got instructions, or will have, of the Court as to what obscene means. "As used in these instructions a particular publication is obscene which to the average, normal adult person, using contemporary community standards, finds it appeals primarily to the prurient interest," which means appeals primarily to, among other things, lewdness of, desire or thought. These magazines, High Heels and Spree—go back in your jury room and read them, read them and apply the standard that you men and women know, and come back here and tell me if they don't appeal to the lewdness of desire or thought, the prurient interest. What other interest could they appeal to? Just take them, if you will. Look through them. "British Beauty: Malvina Price . . . When Melvina isn't

rehearsing or on stage or modelling or out spending her pay on high heels, she reads and paints." Now don't you [fol. 127] know that's a die? Tell me those poses aren't suggestive! Every page in this magazine is filled with this trash. Suggestive? I would certainly think so. And you can't hide behind art and literature with this sort of thing. Turn on over, Barbara Baeno. Now look at it. Is that art or literature, or is it simply lewdness? Every page in the book, every one of them, look at this Gloria Rand on top of a building, half nude, suggestive poses. Read the ads in the magazines. "French Heels," is that kind of literature above or below the community standards? You are the ones that are going to judge it. This is the worst literature I have ever seen on the stands in Paducah, the very worst. Here is an ad, "Large Busted Young Girl Frisky Laine (46-27-38). Shudder with pleasure as her unclad seductive young body eagerly teases, pleases, shows all and leaves you breathless with delight." What is that appealing to? And ladies and gentlemen, if you know anything about the literature on the stands in Paducah, Playboy Magazine, Cavalier, are Sunday school material to this stuff. Spree, it's got a few stories in it. Now I don't know the age of this little girl, but I dare say she is not over 15 years of age. There she's pictured, half nude, suggestive pose, yes or no? This one has got one of these pull-out things. Now isn't that ridiculous? That's all that's in it, it's that kind of stuff. Read the printed matter above and below the pictures and it adds to the thought that is involved there. Read, if you will, the story, "Double Date." Dr. Lowry said it was racy but he didn't think it was obscene. That's the most ridiculous statement that has ever been made from that witness stand, and I have been here a long time.

[fol. 128] This is a story, and you can see what it's about from the pictures, a story about two couples off up somewhere swimming. They had sex relations with their particular dates, then they decided to swap. That's "Double Date." "Yeah," Jim said coaxingly. 'But one's not enough, old Buddy. A guy needs variety, or else he gets stale.'

Rhonda was directly before Barry now, swaying seductively, her full-blown body straining at the thin fabric of her dress. Barry saw that she had not bothered to put on her underclothing after the swim. He licked his lips and tried to control his breathing. His hands ached to grasp those soft, quivering breasts. 'Just say the word, old Buddy,' Jim whispered. 'Just one little word and its a deal.' With a tortured cry, half triumph, half surrender, Barry rose up and dragged the unresisting Rhonda to the day bed. He did not notice Jim lead Janet, stumbling and bleary-eyed, into the small bedroom. He had never dreamed that there could be such strength and tenacity in a woman's limbs, such urgency. Rhonda was everything that Janet was not—active, violent, impetuous. He could never have loved her, but he was grateful for the experience she gave him and the unknown parts of himself that he discovered through it." He couldn't love her, but he was thankful for the sex act. Is this the kind of thing you want on your coffee table, Mrs. Murphy, this thing? Is this the kind of thing this jury is going to tell Paducah, "You can publish this, you can pass it out and have it on your news stands."?

And I ask you, please read the ads in this magazine. This is one I asked the defendant to read and he said he didn't [fol. 129] think it was obscene, an ad for a book, "Sexual Feeling, Covers the entire field of sex in marriage, in addition to such exclusive subjects as: enlarging the erect penis, obtaining satisfaction during menstruation, obtaining satisfaction during masturbation, menstruation, penis fears of wives, overcoming problems of the too-long and too-short husband and the wife's assistance in overcoming semi-impotence." For $4.00 you can buy it, and for a dollar you can get the place to buy it from. You can go down here to Mr. Austin's and buy Spree, you can buy a copy of this book, and your own family, any member of it, can send the $4.00 in and get it.

Here's one, "Sex Adequate Female," you can get this for $2.50. "Chapters include what women should know about

sex; infidelity; the orgasm—ideal, oral-induced, masturbatory, by breast stimulation, and by penis substitutes." This is the kind of trash, and you tell me it would appeal to anything but the prurient interest? Anybody that doesn't believe that is obscene has certainly led a lewd, ridiculous life. This is obscene. They say, "Oh, it comes through the mail, these books, it comes through the mail." Ladies and gentlemen, they have tried to hoodwink this jury about the part the mails play in censoring material like this, and it's just not so. It's just not so. Obscene material comes through the mails everyday in the week, everyday of the week, and as long as it comes everyday of the week to Paducah, Kentucky, we are going to do what we can to stop it, and there is only one way to do that, and that's to return a verdict of guilty in this case.

Now yours is not an easy responsibility. The case is [fol. 130] important. It is up to you ladies and gentlemen to say what standards will be followed in Paducah and McCracken County. All you have got to do is to go back there and apply the standard you know and say to the average person, these appeal to the lewdness of thought and desire. And I say, if they don't appeal to that, what, in God's name, do they appeal to? By your verdict you can do more to clean up Paducah than by any other verdict you will ever render, in this case today. Thank you.

[fol. 131]

IN THE McCRACKEN CIRCUIT COURT

No. 9443

MINUTE ENTRY OF TRIAL—February 27, 1964

[Title omitted]

Came defendant, by counsel, and filed motion for continuance, for reasons stated in said motion, which was overruled by the Court, to which defendant objects and excepts.

Then came defendant, by counsel, and filed motion to dismiss this case, for reasons stated in said motion, which was overruled by the Court, to which defendant objects and excepts.

By agreement of parties it is stipulated that William L. Austin is the owner and operator of Readmore News Stand and was the owner and operator of Readmore News Stand on September 28, 1963.

Then came parties in open court and announced ready for trial. During the selection of a jury defendant, by counsel, moved the Court to discharge the jurors and continue this case for the reason that a reference was made by the Prosecuting Attorney that this was an Appeal from County Court, which was overruled by the Court, since no reference was made as to previous results and the purpose was to determine if any juror had attended the trial in the lower court, and both parties made repeated references to the other trial for this reason in qualifying the jury, to which defendant objects and excepts. On motion of defendant it is ordered that the questioning of the prospective jurors and the complete trial of this case from this point until the completion of the trial be reported by Miss Corinne Lowry, this Court's official Reporter.

[fol. 132] Selection of jurors being completed came the following jury:

Thomas Cornwall, B. J. Morris, Mrs. Harry Houser, James E. Parker, Fred M. Herde, Leonard A. McReynolds, Mrs. Charles R. Murphy, Grat Cox, Joe C. Gardner, Jr., Mrs. Alberta Seaton, John R. Benton and E. B. Cathey, who were legally tested, tried and accepted and the Commonwealth being in open court by attorney and defendant being in open court in person and by counsel, the jury was sworn to try the issue joined. Then came defendant, by counsel, and moved the Court to set aside the swearing of the jury and to discharge the jury and continue the case because the Court had complained to the defendant's attorney, out of the hearing of the jury, that the attorney

was taking an unduly long time with his examination of the first two jurors; however, the examination was permitted to proceed and eventually a jury was empanelled, and said motion was overruled by the Court, to which defendant objects and excepts. At the conclusion of evidence for the Commonwealth, defendant, by counsel, moved the Court for a directed verdict, which was overruled by the Court to which defendant objects and excepts. All the evidence being concluded and there not being time to complete the trial of this case, court was adjourned until 9:00 A.M. tomorrow morning under the usual admonition of the Court. During all recesses and adjournments the usual and required admonition to the jury was given by the Court.

[fol. 133]

IN THE MCCRACKEN CIRCUIT COURT

MINUTE ENTRY OF TRIAL—February 28, 1964

Came the jury empaneled herein on yesterday. Came all parties in interest and the trial of this case was resumed. At the conclusion of all the evidence, the defendant offered (51) separate instructions, some of which the Court gave or incorporated in his instructions and the remainder of which were refused, to which defendant objects and excepts. The Court gave to the jury Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, & 9, to which both parties object and except. Ordered that all said instructions, both those offered and refused and those given by the Court, be filed and made a part of the record herein without being spread upon the order book. Argument of counsel being concluded the jury retired for deliberation and returned into open court the following verdict: "We, the jury, find the defendant, William L. Austin, guilty and fix his punishment at $250.00 fine (Two Hundred & Fifty Dollars) /s/ Fred M. Herde, Foreman".

Wherefore It Is Adjudged by the Court that the Commonwealth of Kentucky, recover of defendant, William L.

Austin, the sum of Two Hundred Fifty Dollars ($250.00) Dollars in fine, and its cost expended, for all of which capias pro fine is awarded.

Bond for the Purpose of Appeal Is Set at $350.00.

[fol. 134]

IN THE McCRACKEN CIRCUIT COURT

Criminal Action No. 9443

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS—
Filed February 28, 1964

Defendant's Instruction No. 1

In order to establish the offense with which the defendant is charged, the evidence must show beyond a reasonable doubt:

1. That the dominant theme of each of the magazines named in the complaint, taken as a whole, have a substantial tendency to deprave or corrupt the average person by inciting lascivious thoughts or arousing lustful desires; and

2. That each of the magazines named in the complaint go substantially beyond customary limits of candor of representation or depiction of matters relating to sex or nudity; and

3. That each of the magazines named in the complaint is utterly without redeeming social importance; and

4. That each of said magazines named in the complaint, applying contemporary community standards, appeals to the shameful or morbid interest of the average person in sex or nudity, bearing in mind contemporary community standards; and

5. That the defendant kept for sale or sold the said magazines in question; and

6. That the defendant knew the contents of the said magazines and knew they were obscene as that term is defined herein, prior to the time he was arrested; and

7. That the defendant, in keeping for sale or selling the said magazines, had the specific intent to deprave or cor- [fol. 135] rupt the average person who might read them by arousing lascivious thoughts or lustful desires.

Alberts v. *California,* 354 US 476;
Morissette v. *United States,* 342 US 246;
Smith v. *California,* 361 US 147;

Defendant's Instruction No. 2

You are instructed that the words "corrupt" and "Deprave" are synonymous. "Corrupt" is defined as changed from a state of uprightness, correctness and truth and implies a loss of original soundness, integrity or purity; a marked or unnatural deterioration.

It cannot be said that a person is corrupt or depraved merely because sensual thoughts or emotions are aroused in him. The test of "corrupt" or "deprave" calls for a showing of an enduring deleterious influence on the average person.

Defendant's Instruction No. 3

The term "contemporary community standards" as used in these instructions are not the standard of a particular individual, group of individuals or locality, but is the standard of the contemporary society of this country at large or as a whole.

Defendant's Instruction No. 4

If you do not find beyond a reasonable doubt that the magazines named in the complaint go substantially beyond

customary limits of candor in representations of matters relating to sex, you should find the defendant not guilty.

Defendant's Instruction No. 5

If you do not find beyond a reasonable doubt that the [fol. 136] magazines named in the complaint, applying contemporary community standards appeal to the prurient interest of the average person, you should find the defendant not guilty.

Defendant's Instruction No. 6

If you do not find beyond a reasonable doubt that the defendant kept for sale or sold the magazines mentioned in the complaint, knowing the contents of the magazines and knowing them to be obscene, you should find the defendant not guilty.

Smith v. *California*, 361 US 147, 4 L Ed 2d 205

Defendant's Instruction No. 7

If you do not find beyond a reasonable doubt that the defendant at the time of keeping for sale or selling each of the magazines named in the complaint knew that the said magazines applying contemporary community standards had a substantial tendency to corrupt or deprave the average person by inciting lascivious thoughts or arousing lustful desires, you should find the defendant not guilty.

Defendant's Instruction No. 8

If you do not find beyond a reasonable doubt that at the time of the keeping for sale or sale of the said magazines named in the complaint, the defendant, with knowledge of the nature and obscene character of the magazines, had the specific intent to deprave or corrupt the average person who might read them by inciting lascivious thoughts or arousing lustful desires, you must find the defendant not guilty.

Defendant's Instruction No. 9

Material is obscene if, and only if, it has a substantial tendency to corrupt or deprave the average person by in- [fol. 137] citing lascivious thoughts or arousing lustful desires and substantially exceeds the limits of candor set by community standards in representation of matters relating to sex, nudity or excretion, and appeals to the shameful or morbid interest of the average person in such matters, and is utterly without redeeming social importance.

Defendant's Instruction No. 10

If the magazines in question are not obscene as I have defined that term for you herein, then the magazines are lawful even if you believe them to be in bad taste, shocking, disgusting, embarrassing, vulgar, noxious, immoral or objectionable.

Hannegan v. *Esquire*, 327 US 146

Defendant's Instruction No. 11

If the material in question does not substantially exceed the limits of candor set by contemporary community standards then it is not obscene because where liberty of speech and press are at issue the community cannot condemn that which it generally tolerates.

Mr. Justice Harlan Concurring in *Smith* v. *California*, *Supra*

Defendant's Instruction No. 12

The test of obscenity under that statute herein is *not* whether the material will have a potentially deleterious influence upon youth. The adult population of the community cannot be reduced to reading, seeing or hearing only what is fit for children. The appeal of the material

involved herein must be measured only by its appeal to the average adult person.

Butler v. *Michigan,* 352 US 380

Defendant's Instruction No. 13

In judging obscenity, it is the impact of the work on the average normal adult that counts. To measure a work by [fol. 138] its impact on youth or peculiarly susceptible persons is unduly restrictive. If you find that the works in question do not have a substantial tendency to corrupt or deprave an average normal adult, then you must find the defendant not guilty.

Butler v. *Michigan, supra*
Roth v. *United States,* 354 US 476

Defendant's Instruction No. 14

You may not convict the defendant if you find the material considered as a whole offends only the sense of propriety, morality or decency of the average person. The statute does not purport to proscribe material which allegedly offends such feelings, and the free speech provisions of the Constitution do not permit it.

Mounce v. *United States,* 355 US 180

Defendant's Instruction No. 15

You are instructed that if you find that the material in question is not obscene within the legal meaning of that term, then regardless of any and all other circumstances you must find the defendant not guilty.

Defendant's Instruction No. 16

You may not rely on instinct in determining whether the material charged in the complaint is obscene. The ascertainment of obscenity cannot be a merely subjective re-

flection of the taste or moral outlook of individual jurors. The determination of obscenity cannot be made on the basis of the personal upbringing or restricted reflection or particular experience of life of the individual juror. If you cannot determine objectively, beyond a reasonable doubt, that the material in question is obscene, as I have defined it, you should find that defendant not guilty.

Mr. Justice Frankfurter concurring in *Smith* v. *California, supra*

[fol. 139] Defendant's Instruction No. 17

Obscenity laws must be restricted to activity which can be defined with precision so as not to endanger the creators, publishers and distributors of unconventional themes or material, or impose an official morality, or reduce the legel [sic] of material to that fit for children.

It is, of course, not your duty to judge the artistic merit of the material before you.

Defendant's Instruction No. 18

The sole test for determining the "obscenity" of material is the one the Court has given you. The mere fact that you find the material is not "obscene", if you so find, does not mean that you endorse every idea or presentation contained in the material, nor are you required to do so. It would conflict with the public interest for each individual juror to establish his own political moral or aesthetic views as the sole standard for determining what material should be circulated.

Roth v. *United States*, 354 US 476

Defendant's Instruction No. 19

If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must

acquit the defendant even if you personally believe that the magazines are obscene.

Smith v. *California, supra;*
Continental Can Co. v. *United States,* 272 F. 2d 312

Defendant's Instruction No. 20

In this case the commonwealth must prove beyond a reasonable doubt that the defendant had a specific intent to violate the law. You may not infer the specific intent merely on the basis of suspicion, conjecture or surmise, and if you upon all of the evidence you are not satisfied beyond a reasonable doubt that the defendant had such a specific intent you should find the defendant not guilty.

Smith v. *California, supra*

[fol. 140] Defendant's Instruction No. 21

Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that private transactions have been fair and legal; that the ordinary course of business have been followed, and that the law has been obeyed.

Defendant's Instruction No. 22

The state of mind of the defendant can only be established by his own acts and declarations, and cannot be imputed to him by the acts and declarations of others.

Keegan v. *United States,* 325 478 [sic]

Defendant's Instruction No. 23

In every crime there must exist a union or joint operation of act and intent. The burden is always upon the prosecution to prove both act and intent beyond a reasonable doubt.

Defendant's Instruction No. 24

Our society plainly tolerates a great deal of erotic interest in pictures, literature, advertising, recordings, and art in the mass media. This tolerance is not limited to the conventional or orthodox, but includes the unusual and even the bizarre. You may not convict the defendant here if you find that the material charged in the complaint does not go substantially beyond what is tolerated in our society, considering the nation as a whole.

American Law Institute, *Tentative Draft* No. 6, p. 10; Mr. Justice Harlan concurring in *Smith* v. *California, supra*

Defendant's Instruction No. 25

In judging obscenity it is necessary to take into account "contemporary community standards." This means what is going on in the community, not necessarily what ought to be going on.

[fol. 141] *Alberts* v. *California, supra;*
Roth v. *United States, supra;*
Smith v. *California, supra;*

Defendant's Instruction No. 26

The mere fact that the material herein may appeal to prurient interest, if you should so find, does not necessarily stamp it as "obscene." In addition, the appeal to prurient interest must go substantially beyond customary limits of candor in description or representation. The term "customary limits of candor" recognizes that customs change; that the community tolerates much that particular segments of the population might regard as appealing to prurient interest.

American Law Institute, *Model Penal Code, Tent. Draft* No. 6

Defendant's Instruction No. 27

In determining community standards you have a right to consider that discussions of sex and the realistic portrayal of sex and sex relations appear candidly and openly in the daily newspapers, in the motion pictures, in the theater, on television, in books, magazines, pamphlets, music, song and the dance; in fiction and scientific works, and manuals; in all media of communication.

Smith v. *California, Supra*

Defendant's Instruction No. 28

People differ widely in their tastes with regard to material such as that charged in the complaint. What may be bad taste or offensive to some people will turn out to be amusing or entertaining to others. Obscenity is not a matter of taste. The mere fact that you may find the material here in question offensive or in bad taste constitutes no sufficient basis for a finding that the material is obscene.

Hannegan v. *Esquire, supra.*

[fol. 142] Defendant's Instruction No. 29

In applying present day community standards, you have a right to consider what is commonly accepted today by the average person on television, in the motion pictures, in records, in newspapers, advertisements, in music, in songs, in the dance, art magazines, joke books, novels, burlesque, and all other media of communication.

Alberts v. *California, supra;*
Smith v. *California, supra;*

Defendant's Instruction No. 30

I instruct you that in considering contemporary community standards you should take into account the disposition

courts have made of cases dealing with material similar to that involved in this case.

American Law Institute, *Model Penal Code, Tent. Draft,* No. 6, p. 42.

Defendant's Instruction No. 31

The free speech provisions of the Constitution of the United States guarantee accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. A requirement that literature or art conform to some norm prescribed by an official smacks of ideology foreign to our society. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash will have for another some fleeting or even enduring values.

Hannegan v. *Esquire,* 327 U.S. 146

Defendant's Instruction No. 32

A work designed to entertain, amuse, or consider the unusual is as much entitled to the protection of free speech as a scientific or educational work.

[fol. 143] *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495
Winters v. *New York,* 337 U.S. 507
Smith v. *California, supra*

Defendant's Instruction No. 33

No arm of government—and that includes you acting as jurors—has the power to suppress communications by subjective rather than by confining objective standards. You may not make your personal opinion the rule of judgment and approve or condemn the material as it shall square with or differ from your own.

Thornhill v. *Alabama, supra*
Near v. *Minnesota,* 283 U.S. 713
Smith v. *California, supra,* Mr. Justice Frankfurter concurring.

Defendant's Instruction No. 34

Sex and obscenity are not synonymous. All subjects, including those dealing with sex, homosexuality, sexual variations are proper subjects for all media of communication. Communications dealing with these subjects are within the broad protection of freedom of speech and press even if you believe they are of no value to society, provided, however, they are not obscene as I have defined that term for you.

Defendant's Instruction No. 35

Your own personal and social views on material such as that charged in the complaint may not be considered. Thus, whether you believe that the material is good or bad is of no concern; so too you may not consider whether in your opinion the material is moral or immoral; whether it is likely to be helpful or injurious to the public morals. Similarly, whether you like or dislike the material; whether it offends or shocks you, may not be considered by you. You may think the material is immoral, shocking or offensive and yet you must acquit the defendant if it is not obscene as the Court has defined that term for you.

Smith v. *California, supra,* Mr. Justice Frankfurter concurring.

[fol. 144] Defendant's Instruction No. 36

While the statute in question uses the term "obscene and indecent," and while the term "indecent" has a broader dictionary meaning than the term "obscene," I instruct you that its legal meaning is identical to that of the term obscene. Unless the magazines can be found to be obscene

as that term is defined in law, no crime has been committed even if it may be felt that the magazines are indecent.

Commercial Pictures Corp. v. *Regents,* 346 U.S. 587.

Defendant's Instruction No. 37

The mere fact that a magazine may offend the views of a majority of the people is no sufficient reason to find it obscene. The guarantees of the Constitution are not confined to the expression of ideas that are conventional or shared by a majority. The constitution protects the portrayal of ideas and pictures that are offensive and even hateful.

Kingsley International Pictures Corp. v. *Regents,* 360 U.S. 684

Defendant's Instruction No. 39

The term "prurient" means a shameful and morbid interest in sex.

It cannot be said that a prurient interest has been aroused in an average person merely because sensual thoughts or emotions are aroused in him.

[fol. 145] Defendant's Instruction No. 40

The law does not attempt to regulate matters which merely depend on taste, manners, aesthetics or artistic skill. If you find that the material charged in the complaint is merely in poor taste or vulgar or shocking you may not find it to be obscene.

Defendant's Instruction No. 41

You may not convict the defendant if you find that the material considered as a whole offends only the sense of propriety, morality and decency of the average person. The statute does not purport to proscribe material which allegedly offends such feelings and the free speech provisions of the Constitution do not permit it.

Mounce v. *United States,* 355 U.S. 180.

Defendant's Instruction No. 42

I instruct you further that you are not permitted, on circumstantial evidence alone, or when the case of the Commonwealth rests substantially on circumstantial evidence to find the defendant guilty of the crime charged against him unless that proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion.

Defendant's Instruction No. 43

When the case which has been made out by the Commonwealth against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt.

Defendant's Instruction No. 44

It is important that you remember that you as jurors must find facts and not express opinions. You must not regard yourselves as a board of censors. You are to decide [fol. 146] only whether the material is obscene, as I have defined that term, and whether the defendant acted wilfully and lewdly in keeping for sale or selling the material.

Defendant's Instruction No. 45

There is a considerable difference between that which shocks and disgusts and that which corrupts and depraves. Therefore, the mere fact that you may be shocked or disgusted does not render the material obscene in law.

Defendant's Instruction No. 46

In approaching your task as jurors in this case you must act as men and women of the world, not with prudish minds,

but with liberal minds, recognizing that there is much material on the market which we as individuals do not like, but which nevertheless a free society must tolerate.

Defendant's Instruction No. 47

I instruct you that none of the words used in any of the material charged in the complaint are in and of themselves obscene in law. There are many words which are considered in bad taste and vulgar but as a matter of law no word in and of itself can be said to have a substantial tendency to corrupt or deprave an average person, hence, no word in and of itself can be obscene.

Grove Press, Inc. v. *Christenberry,* 175 F. Supp. 488

Defendant's Instruction No. 48

You have no right to return a verdict which is not based upon evidence introduced in this trial. You may not return a verdict of guilt based upon surmise, opinion or guess work.

Defendant's Instruction No. 49

When you are considering whether the material charged in the complaint has a tendency to corrupt or deprave an average person you should, of course, keep in mind the climate of our present day society. If you find that our society tolerates more today with regard to the descrip-
[fol. 147] tion or representation of matters pertaining to sex than was tolerated in earlier times, this fact should be taken into account by you.

Regina v. *Penguin Books, Ltd.*

Defendant's Instruction No. 50

The law presumes the defendant in this case to be innocent of any offense until he is proven guilty beyond a reasonable doubt, and if upon the whole case you have a

reasonable doubt as to his guilt or as to any material factor necessary to establish his guilt, then you will find the defendant not guilty.

Defendant's Instruction No. 51

A unanimous verdict is required in this case. If you reach a verdict, however, it shall be necessary for only one of you to sign the verdict as the foreman.

[File endorsement omitted]

[fol. 148]

IN THE McCRACKEN CIRCUIT COURT

[Title omitted]

INSTRUCTIONS TO THE JURY—Filed February 28, 1964

1. If the jury believe from the evidence in this case beyond a reasonable doubt that the defendant, William L. Austin as the owner and operator of Readmore News Stand, did on the 28th day of September 1963 at said place of business in Paducah, McCracken County, Kentucky, knowingly have for sale or in his possession there with the intent and purpose that same be sold the two magazines referred to in the evidence and filed therein as Commonwealth Exhibit 1 and 2, that on said date and on the occasion mentioned in the evidence said magazines were sold to Catherine Wathen by an employee of said defendant, that said employee had been authorized by defendant to sell said magazines and had assented to the sale of them, and that the defendant had knowledge of the contents and the character of said magazines, and if you further believe beyond a reasonable doubt that said magazines or either of them were obscene and of an indecent character, you will find the defendant guilty as charged and fix his punishment at a fine of not less than $50.00 nor more than $500.00 or imprison him for not more than six months, or both so fine and imprison him.

2. As used in these instructions a particular publication is obscene which to the average normal adult person using contemporary community standards finds appeal primarily to the prurient interest, which means an appeal primarily [fol. 149] to lasciviousness, baseness, or lewdness of desire or thought.

3. As used in these instructions the word indecent means anything which is lewd or lascivious, obscene or grossly vulgar, unbecoming, unseemly and unfit to be seen or heard.

4. The test in each case is the effect of the magazines in question when considered as a whole, not upon any particular class but upon all these whom they are likely to reach. The magazines in question must be judged as a whole in their entire context and you are not to consider detached or separate portions except in their relationship to the entire magazine. You must judge the magazines in question which have been put in evidence by contemporary community standards. You must consider whether the literature is patently offensive according to the contemporary community standards; whether the literature taken as a whole goes substantially beyond the customary limits of candor in description or representation of such matters, and whether taken as a whole its predominant appeal is to the prurient interest. You may ask yourselves do they offend the common conscience of the community by contemporary community standards based upon your finding of what is the common conscience of the community as a whole under contemporary community standards.

5. The term "contemporary community standards" as used in these instructions are not the standard of a particular individual, group of individuals or locality, but it is the standard of the contemporary society of this country at large or as a whole.

6. If you do not find beyond a reasonable doubt that the magazines named in the complaint, applying contemporary community standards, appeal to the prurient inter-

est of the average person, you should find the defendant not guilty.

[fol. 150] 7. In judging obscenity, it is the impact of the work on the average normal adult that counts. To measure a work by its impact on youth or peculiarly susceptible persons is unduly restrictive. If you find that the works in question do not have a substantial tendency to corrupt or deprave an average normal adult, then you must find the defendant not guilty.

8. The law presumes the defendant in this case to be innocent of any offense until he is proven guilty beyond a reasonable doubt, and if upon the whole case you have a reasonable doubt as to his guilt or as to any material factor necessary to establish his guilt, then you will find the defendant not guilty.

9. A unanimous verdict is required in this case. If you reach a verdict, however, it shall be necessary for only one of you to sign the verdict as the foreman.

C. Warren Eaton, Judge, McCracken Circuit Court.

[File endorsement omitted]

[fol. 153]

IN THE MCCRACKEN CIRCUIT COURT

MOTION TO SET ASIDE VERDICT AND DISMISS COMPLAINT—Filed March 5, 1964

The defendant moves the Court to set aside the verdict rendered by the jury on February 28, 1964, and to dismiss the complaint on the following grounds:-

1. That the evidence plainly shows that the magazines themselves were within the limits protected by the First and Fourteenth Amendments of the Constitution of the United States and are not obscene.

2. That the Commonwealth failed to produce any evidence as to community standards or that the publications charged here went beyond the customary limits of candor in matters relating to sex or nudity.

3. That the statute under which the defendant was prosecuted is unconstitutional as violating the Fourteenth Amendment of the Constitution of the United States because it relieves the Commonwealth of the duty to prove knowledge on the part of the defendant of the fact of the obscenity of the magazines if obscene they were, and that he knew of their being sold in the store.

Chas. A. Williams, James G. Apple, Broadway at Seventeenth, Attorneys for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 154]

IN THE MCCRACKEN CIRCUIT COURT

MOTION FOR NEW TRIAL—Filed March 5, 1964

Defendant moves the Court to set aside the verdict and grant a new trial in this action and for grounds for same states:

1. That the Court erred in admitting evidence for the Commonwealth over the objection of the defendant which was incompetent and in refusing to admit on the part of the defendant evidence which was competent, relevant and material.

2. The Court instructed the jury under instruction No. 5 that "community standards meant the standard of the contemporary society of the country at large or the country as a whole" and while this was a correct instruction the court had during the course of the trial refused to admit proof as to what the community standards were. It should

further be noted that the Commonwealth was not required to sustain any burden of proof in this regard.

3. The Court refused to permit the introduction of, for consideration by the jury, literature and photographs which went beyond the limits exhibited in the two magazines in question and which would have reflected contemporary community standards and shown conclusively that the contemporary community standards tolerated literature going far beyond that exemplified by the magazines in question.

[fol. 155] 4. That the Court erred in refusing to permit exhibition to the jury of a portion of the record of a case which was held by the Supreme Court of the United States to be within the protective shelter of the First and Fourteenth Amendments to the Constitution of the United States.

5. The instructions of the Court do not properly tell the jury that if they found that the defendant did not know that the magazines were obscene and that they were being offered for sale, then it was the obligation of the jury to return a verdict of acquittal.

6. Under the instructions given by the Court the jury would have been unable to arrive at a proper verdict since there was insufficient evidence before the jury on which it could base its opinion under the instructions.

Chas. A. Williams, James G. Apple, Broadway at Seventeenth, Paducah, Kentucky, Attorneys for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 156]

[Title omitted]

MINUTE ENTRY OF ORDER OVERRULING DEFENDANT'S MOTION TO SET ASIDE VERDICT AND DISMISS COMPLAINT—March 9, 1964

The defendant having filed his motion to set aside the verdict rendered by the jury on February 28, 1964, and to dismiss the complaint against him, and said motion having been considered by the Court and the Court being sufficiently advised does hereby overrule said motion to which ruling the defendant objects and excepts.

[Title omitted]

MINUTE ENTRY OF ORDER OVERRULING MOTION FOR NEW TRIAL—March 9, 1964

The defendant having filed his motion to set aside the verdict and to grant a new trial in this action, and said motion having been considered by the Court and the Court being sufficiently advised, does hereby overrule said motion, to which ruling the defendant objects and excepts.

.....

[fol. 157]

IN THE McCRACKEN CIRCUIT COURT

Criminal Action No. 9443

[Title omitted]

NOTICE OF APPEAL—Filed March 14, 1964

Notice is hereby given that the defendant, William L. Austin, hereby appeals to the Court of Appeals of Kentucky from the judgment entered against him on February 28, 1964, rendered upon the verdict of the jury in this case on the same date, finding the defendant guilty of selling and offering for sale obscene literature in violation of KRS 436.100, and setting his fine at $250.00, and the Order of court overruling defendant's motion for a new trial, defendant's motion for new trial having been overruled by order entered on March 9, 1964.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Defendant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 158] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 159]

IN THE COURT OF APPEALS OF KENTUCKY

File # S-60-64

Dist # 1

Bond Required

"Offering Obscene Literature for Sale"

WILLIAM L. AUSTIN,

vs.

COMMONWEALTH OF KENTUCKY.

DOCKET ENTRIES

1 vol. ($21.20)

May 11, 1964	Filed Tax Paid. Appeal by notice. Attest: Drexell R. Davis, C. C. A. By John C. Scott D. C.
May 11, 1964	Appellant filed Transcript of Evidence (1 vol.) also 1 Box of Exhibits filed in file Room
May 11, 1964	Appellant filed notice and motion for appeal
June 17, 1964	Agreed motion filed for ext. of time of 60 days to and incl. Aug. 19, 1964, for appellant to file brief. Sustained JBM ah 6-17-64.
August 17, 1964	Appellant filed briefs and notice
Sept. 23, 1964	Appellee filed not. and mot. for ext. time to and incl. Nov. 15, 1964, to file briefs. 10-5-64 Sustained JBM ah

November 13, 1964	Appellee filed briefs and notice
November 13, 1964	Submitted
November 27, 1964	Appellant filed not. and mot. for ext. time of 20 days from Dec. 3, 1964, to file reply briefs Sustained JBM ah 12-2-64
Dec. 23, 1964	Appellant filed reply briefs and notice.
January 18, 1965	Appellant filed notice and motion for oral argument
Jan. 22, 1965	Per Curiam Opinion Delivered (Moremen, C. J. dissenting) Motion for Appeal Overruled.
Feb. 18, 1965	Appellant filed notice and motion to reconsider its per curiam opinion of Jan. 22, 1965.

McCracken County.
Hon. C. Warren Eaton, Judge.
Courthouse, Paducah, Kentucky.

John B. Browning, Asst. Atty. Gen., Hon. Robert F. Matthews, Atty. General, Hon. Albert Jones, Commonwealth Atty., Courthouse, Paducah, Kentucky, Attorneys for Appellee.

Hon. Charles A. Williams, Broadway & Seventeenth Streets, Paducah, Kentucky, Attorney for Appellant.

[fol. 160]

Page # 2

No Bond Required

File No. S-60-64

81645

Dist. # 1

"Offering Obscene Literature for Sale"

WILLIAM L. AUSTIN,

vs.

COMMONWEALTH OF KENTUCKY.

Appellee	Appellant
Trans.	Trans. .....
C. C. A. 8.55	C. C. A. 12.95
Atty. 20.00	Atty. .....
Fee Book No. 45	Page 445

November 13, 1964	Submitted
January 22, 1965	Per Curiam Opinion Delivered (Moreman, C. J. Dissenting) Motion for Appeal Overruled.
March 2, 1965	Court order delivered Overruling Motion for Oral Argument and Motion to Reconsider Be Treated as Petition for Rehearing.
March 8, 1965	Appellee filed response and notice to petition for reh. (Motion to Reconsider treated as such)
Mar. 19, 1965	Mandate Issued

July 15, 1965	Appellant filed Designation of Record to the Supreme Court of the United States.
July 28, 1965	Appellant filed not. & mot. to withdraw exhibits to take to Supreme Court
July 28, 1965	Court Order Delivered Granting that Exhibits Be Sent to Supreme Court by Clerk of Court of Appeals.

[fol. 161]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

STATEMENT OF APPEAL—Filed May 11, 1964

1. The name of the appellant is William L. Austin. The name of the appellee is Commonwealth of Kentucky.

2. Counsel for the appellant is Charles A. Williams, Broadway at Seventeenth, Paducah, Kentucky.

3. Counsel for the appellee are Albert Jones, Commonwealth Attorney, County Court House, Paducah, Kentucky, and Robert Matthews, Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky.

4. The trial judge was the Honorable C. Warren Eaton, McCracken Circuit Court, County Court House, Paducah, Kentucky.

5. The judgment appealed from was entered February 28, 1964, and appears on page 11 of the transcript of the record. Appellant also appeals from the order of the court overruling his motion for a new trial which was entered March 9, 1964 and appears on page 33 of the transcript of the record.

6. Notice of appeal was filed on March 14, 1964, and appears on page 1 of the transcript of the record.

[fol. 162] 7. This appeal is being prosecuted under KRS 21.140 (2) and the appellant is free on bond.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 163]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

MOTION FOR APPEAL—Filed May 11, 1964

Pursuant to KRS 21.140 (2) appellant respectfully moves the court that they grant him an appeal in this case from the final judgment of the McCracken Circuit Court, McCracken County, Kentucky, imposing upon him a fine of $250.00.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 164]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

[Title omitted]

MOTION FOR ORAL ARGUMENT—Filed January 18, 1965

Appellant moves the court to grant an oral argument in the above styled action and for grounds for same states that due to the vast number of Federal cases that have been decided and the complexity of the problem, it would be fair to the court and the litigants to have oral argument in this action.

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

Proof of Service (omitted in printing).

[File endorsement omitted]

[fol. 165]

IN THE COURT OF APPEALS OF KENTUCKY

WILLIAM L. AUSTIN, Appellant,

v.

COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from McCracken Circuit Court, C. Warren Eaton, Judge.

PER CURIAM OPINION OVERRULING MOTION FOR APPEAL—January 22, 1965

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRS 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant:

Charles A. Williams, Paducah, Kentucky.

Attorneys for Appellee:

Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky;

Albert Jones, Commonwealth Atty., Paducah, Kentucky.

[fol. 167] Certificate of service (omitted in printing).

[File endorsement omitted]

[fol. 169]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

[Title omitted]

MOTION TO RECONSIDER—Filed February 18, 1965

Appellant moves the court to reconsider its per curiam opinion of January 22, 1965, in this action in which it overruled appellant's motion for an appeal and by the same action denied appellant's motion for oral argument, with Chief Justice Moremen dissenting.

For grounds for said motion appellant states:

1. That apparently the case was lightly treated due to the fact that there was a $250.00 fine for the court overruled the motion for appeal and denied motion for oral argument.

2. The per curiam opinion of the court lays down no guide lines for future defendants or for the appellant who is in the business of operating a bookstore as to what is obscene and what is not, particularly in view of the decisions of the United States Supreme Court, which seem to be in direct conflict with the ruling of this court.

[fol. 170] 3. It is believed that the motion for oral argument should have been sustained and this court should have thoroughly gone into the problem since the citizens of this state should know in what manner the court of last resort of this state distinguishes these magazines from the magazines and publications considered in the many cases cited by the appellant *and the Commonwealth* in their briefs.

4. The appellant and others who may be in a similar position like his in Kentucky have no compass to point the way for them to conduct their business if this decision of this court is permitted to stand.

5. The decision of this court gives no chart or ground rules for the trial of obscenity cases in view of the trial court's ruling in this case which *did not require the Commonwealth to show what the community standards were* as is plainly required by the decisions by the United States Supreme Court cited in appellant's brief and further *prevented the appellant (defendant below) from offering proof to show what had been accepted by the community.* This, when considered with the standards laid down in the case of *Roth* v. *United States,* 354 U.S. 476, 1 L. Ed. 2d 1498, as was reiterated in *Jacobellis* v. *Ohio,* 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793, certainly would seem to entitle business men, and their lawyers, to know what shall and what shall not be admissible in the trial of an obscenity case in the future.

[fol. 171] In summary, if this court lets its ruling of January 22, 1965 in this action stand, it is in effect saying to the booksellers of Kentucky that:

1. This court refuses to lay down guide lines.

2. That the possession in a bookstore requires them to know that which is obscene and they must limit the quantity of books to what they can inspect and examine which is exactly contradictory to the ruling of the United States Supreme Court in the case of *Smith* v. *California,* 361 U.S. 147, 4 L. Ed. 2d 205. They must also try to segregate the obscene from the proper with almost impossible rules to guide them.

3. Even though this court has not laid down any guide lines, booksellers are presumed to know the content of every book offered for sale and even though it, or more offensive literature, has been approved by courts in other states or by the Supreme Court of the United States, they are still subject to the hazards of prosecution in the courts of Kentucky since this court has not said that it will follow the guide lines laid down by the Supreme Court of the United States.

Movant therefore urges the court to reconsider its ruling and to set this matter for oral argument so that the appellant may save an adequate day in court and so that this court may avoid much further litigation by settling this question once and for all.

[fol. 172] Since filing appellant's brief and reply brief, the case of *Ellenberg* v. *State*, 1964, Tennessee, 384 S.W. 2d 29, has been decided by the Supreme Court of Tennessee, holding its obscene literature statute unconstitutional and it is thought this is pertinent to the case at Bar.

Wherefore appellant moves this court to set aside its order of January 22, 1965, and set the matter of the motion for appeal down for oral argument and that the motion for appeal be granted and that the case be considered on its merits.

Respectfully submitted,

Chas. A. Williams, Broadway at Seventeenth, Paducah, Kentucky, Attorney for Appellant.

[fol. 173]

APPENDIX A TO MOTION TO RECONSIDER

Rendered: January 22, 1965

COURT OF APPEALS OF KENTUCKY

WILLIAM L. AUSTIN, Appellant,

v.

Appeal from McCracken Circuit Court

C. Warren Eaton, Judge

COMMONWEALTH OF KENTUCKY, Appellee.

Per Curiam

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRS 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant: Charles A. Williams, Paducah, Kentucky.

Attorneys for Appellee: Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky; Albert Jones, Commonwealth Atty., Paducah, Kentucky.

[fol. 174]

IN THE COURT OF APPEALS OF KENTUCKY

[Title omitted]

ORDER OVERRULING MOTION FOR ORAL ARGUMENT—
March 2, 1965

It Is Ordered by the Court that appellant's motion for an oral argument be overruled and that the "Motion to Reconsider" be accepted and treated as a petition for rehearing.

Entered this March 2, 1965

John R. Moremen, Chief Justice.

[fol. 176] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 178]

IN THE COURT OF APPEALS OF KENTUCKY

File No. S-60-64

RESPONSE TO PETITION FOR REHEARING—
Filed March 8, 1965

Statement

The order of the Court entered March 2, 1965, in this case rules that appellant's "Motion to Reconsider" shall be accepted and treated as a petition for rehearing. Appellee makes the following response to the petition for rehearing:

I. Appellant Does Not Point Out Any Material Facts Overlooked or a Controlling Decision Not Taken Into Account, and the Petition for Rehearing Presents Nothing New.

Appellant does not point out any material facts which may have been overlooked in the briefs originally filed by the parties. The only new case cited for consideration is *Ellenberg* v. *State,* 384 S.W. 2d 29 (Tenn., 1964) in which the Supreme Court of Tennessee held the obscene literature statute of that state unconstitutional. However, that decision involved a statute which clearly did not require the element of scienter for conviction, whereas KRS 436.100 expressly requires that the bookstore operator have had knowledge of the contents of the literature sold.

II. Appellee Has No Objection to Noting What Standards Used for Decision.

Heretofore the law in Kentucky as to obscene literature was contained in the case of *King* v. *Commonwealth,* 313 [fol. 179] Ky. 741, 233 S.W. 2d 522 (1950) which set out standards for determining obscenity. This decision, of course, has been superseded by the Supreme Court opinions in the Roth, Manual Enterprises and Jacobellis cases. New constitutional standards for judging obscenity were proclaimed in those cases.

Although we think the record shows that the lower court correctly applied the Supreme Court tests, it probably would not hurt anything if the Court simply noted in its order that it had evaluated the motion for appeal according to the standards set out in the latest Supreme Court cases.

Conclusion

The petition for rehearing raises nothing new in the way of facts or law and must be overruled.

Respectfully submitted,

Robert Matthews, Attorney General, By John B. Browning, Assistant Attorney General.

[fol. 180]

IN THE COURT OF APPEALS OF KENTUCKY

Style: Austin v. Commonwealth
County: McCracken

ORDER OVERRULING MOTION TO RECONSIDER

Original Opinion—Judge: Per Curiam

Motion to Reconsider—Judge: Waddill

(Appellants) Overruled

[fol. 181] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 182]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1964

WILLIAM L. AUSTIN, Petitioner,

vs.

KENTUCKY.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 8, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including August 16, 1965.

Potter Stewart, Associate Justice of the Supreme Court of the United States.

Dated this 8th day of June, 1965

[fol. 183]

SUPREME COURT OF THE UNITED STATES

No. 453, October Term, 1965

WILLIAM L. AUSTIN, Petitioner,

v.

KENTUCKY.

ORDER ALLOWING CERTIORARI—April 25, 1966

The petition herein for a writ of certiorari to the Circuit Court of McCracken County of the Commonwealth of Kentucky is granted, limited to Question 2 presented by the petition which reads as follows:

"2. Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be obscene 'shall be prima facie evidence' that the seller had 'knowledge of the obscene character' of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had [fol. 184] a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Stewart are of the opinion that certiorari should be granted on all the questions presented by the petition.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 456 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

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IN THE

Supreme Court of the United States

October Term, 1965
No. .....

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

Petition for a Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Petitioner, William L. Austin, prays that a writ of certiorari issue to review the judgment of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, entered in the above entitled case on February 28, 1964.

Opinions Below.

The case was initially tried before a trial commissioner, and jury, in the Quarterly Court of McCracken County, Commonwealth of Kentucky. No opinion was delivered by the said court. On appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, the case was tried *de novo* before a judge and jury. No opinion was delivered by the said court. The

per curiam opinion of the Court of Appeals of Kentucky, Chief Justice Moremen dissenting, overruling petitioner's motion for an appeal [R. 147], is reported in 386 S.W. 2d 270. No opinion was delivered in overruling petitioner's petition for rehearing.

Jurisdiction.

The judgment of conviction of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky was entered on February 28, 1964 [R. 11]. A copy of the said judgment is annexed hereto as Appendix A. Petitioner's motion for an appeal from said judgment of conviction was denied in a *per curiam* opinion by the Court of Appeals of Kentucky on January 22, 1965, Chief Justice Moremen dissenting, without opinion. A copy of the said *per curiam* opinion and order are annexed hereto as Appendix B. Petitioner's due and timely petition for rehearing [R. 148-149] was overruled by the Court of Appeals on March 19, 1965 [R. 135, 151]. 386 S.W. 2d 270. By reason of the aforesaid, the judgment of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, is the highest court of the State of Kentucky "in which a decision could be had". See, *Butler v. Michigan,* 352 U.S. 380, 382; *Thompson v. City of Louisville,* 362 U.S. 199, 202. By order of Justice Potter Stewart dated June 8, 1965, the time to file this petition for a writ of certiorari was extended to and including August 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether, consistent with the free speech and press provisions of the First Amendment and the due process requirements of the Fourteenth Amendment, as well as the constitutional standards for judging obscenity enunciated by decisions of the Supreme Court, the two publications involved in the prosecution herein upon which the judgment of conviction was rendered are entitled to constitutional protection.

2. Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be obscene "shall be prima facie evidence" that the seller had "knowledge of the obscene character" of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered.

3. Whether the wholesale exclusion of essential comparable evidence offered by petitioner on the issue of contemporary community standards arbitrarily deprived petitioner of his liberty without due process of law and abridged freedoms of speech and press guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Kentucky Revised Statutes, Section 436.100, subdivisions 1, 2 and 4, are annexed hereto as Appendix C.

Statement of the Case.

(a) By complaint, sworn to by Mrs. Katherine Wathen and filed in the Quarterly Court of McCracken County, Commonwealth of Kentucky on October 11, 1963 [R. 2], petitioner was charged with selling, offering to sell, having in possession, with intent to sell and offer to sell, two magazines, to wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", it being alleged by the affiant Wathen that both of said publications were "obscene" and contained "obscene pictures and writing or printed material of an indecent character". The verified complaint alleged that petitioner had knowledge of the "contents or character" of the two magazines [R. 2]. The case came on for trial before a Trial Commissioner and a jury of six in the Quarterly Court of McCracken County, Commonwealth of Kentucky. The jury found petitioner guilty as charged, and fixed the punishment at a fine of $100.00 [R. 3]. Peti-

tioner prosecuted an appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 5]; *supersedeas* was granted [R. 6]; and the case thereupon came on for trial *de novo* before the Honorable C. Warren Eaton, a Judge of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, and a jury, on February 27 and 28, 1964 [R. 38].

(b) The petitioner is in the wholesale news distribution business, with agencies in Shelbyville, Jackson and Nashville, Tennessee; Carbondale, Illinois, and Paducah, Kentucky [R. 60]. For many years, the petitioner has also owned and operated [R. 38] a large retail book store and newsstand known as Readmore, located in Paducah, Kentucky [R. 61], where hard cover books from all major publishers are sold, including technical works, religious treatises and children's books [R. 61-62]. Petitioner is a member of the American Book Sellers Association and Christian Book Sellers Association [R. 62]. Readmore also sells newspapers, paperback books and magazines [R. 62-63]. There are about 11,000 titles handled at Readmore each month, to wit, about

> "three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition" [R. 63].

The case against petitioner was as follows: On the 28th day of September, 1963, Katherine Wathen, a resident of Paducah, went into Readmore, and purchased from a saleslady in the store, two magazines. For each of the periodicals — "High Heels", vol. 2, No. 6 [Comm.

Ex. 1, R. 40] and "Spree", No. 38 [Comm. Ex. 2, R. 40] — the witness paid $1.00 plus tax [R. 40]. Prior to the purchase on September 28, 1963, Mrs. Wathen called Mrs. Patsy McWaters and told her that she, Mrs. Wathen, was going to Readmore "to buy magazines" and that she would like Mrs. McWaters to be present when the purchase was made, "so she could be a witness" in court [R. 48]. Thus, Mrs. McWaters was present at the time of the purchase of the two magazines [R. 42]. After the purchase of the publications, Mrs. Wathen took the two magazines home, read "practically all" of the contents, and then brought them to the courthouse where "the summons was issued" [R. 43].

Patsy McWaters [R. 51] testified that she went to Readmore at Mrs. Wathen's telephonic request [R. 51-52]. Mrs. McWaters witnessed the purchase of the two magazines from the sales clerk [R. 52].

Reverend Herbert Simpson [R. 54], a minister residing in Paducah [R. 54] and a member of the Citizens for Decent Literature [R. 57], testified that petitioner, in May of 1963, met with a ministers committee "on moral and social welfare" at the invitation of the ministers [R. 54], where they discussed the "same character and class" of magazines as the publications involved in the case herein [R. 56]. The group of ministers was interested in what "rules or standards" petitioner was maintaining in the store [R. 56]. At the meeting with petitioner, the ministers' organization did not specifically name any magazine [R. 57].

The Commonwealth rested its case [R. 59].

The petitioner testified that it was his policy at Readmore to cooperate with any group or even individual

that came to him to express a complaint [R. 65]. The volume of books and periodicals handled monthly at Readmore was extremely large [R. 63]. Petitioner did not even know that the two magazines herein involved were on the stand, and the first time he learned about them was when he received the summons based on Mrs. Wathen's complaint [R. 71].

Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, and that he had written to his publishers to this effect [R. 63, 67; Deft. Ex. 1 for ident.]. Petitioner offered to prove that a wide variety of comparable magazines were sold by his distribution agencies throughout the numerous communities and areas serviced by said agencies, none of which magazines had ever been barred or restricted by any governmental authority or community in the areas where the magazines were sold [R. 69-70]. All these efforts by petitioner to prove lack of unlawful knowledge or intent were rejected by the trial court [R. 64-65, 66-67, 69-70].

Wade Sherrill [R. 82], on behalf of petitioner, testified that he was employed as receiving clerk and general warehouse manager for petitioner, doing business as the Basin News Company, the wholesale distributor for the Kentucky area as well as Missouri, Tennessee and parts of Illinois [R. 82]. An attempt was made to prove through the witness that he was under instructions as a matter of policy not to distribute magazines which had no second-class mailing permits, but objections to such testimony were sustained [R. 83]. The witness was also asked whether it was possible to check all the publications as to contents and character, but

objections to this line of questions were also sustained [R. 83-84].

The petitioner called Dr. C. S. Lowry [R. 84], holder of a Bachelor of Arts degree and a Master of Arts degree from Harvard University, and a Ph. D. degree from the University of Kentucky [R. 84]. Dr. Lowry has been with Murray State College at Murray, Kentucky for almost forty years, and is presently head of the Department of Social Science [R. 84-85].

Dr. Lowry, at the request of counsel, had examined the two magazines here involved [R. 87]. The witness stated that he was aware of the extent to which magazines of this type sold in the various areas in the community and in other States [R. 88-89]. In the opinion of the witness, the publications did not exceed customary limits of candor in the community, nor "go as far as some which are generally accepted" [R. 89]. Dr. Lowry was of the opinion that the magazines did not create a shameful or morbid interest in sex or nudity in the average person who might examine them [R. 90]. The witness had read the magazines from cover to cover [R. 91]. None of the textual material, in the opinion of the witness, was obscene, nor did the description of sex in the magazines exceed the description of sex in books and publications generally accepted [R. 91].

The petitioner offered through the witness to put into evidence books which had been sold and accepted in Kentucky, Tennessee and the entire geographical area [Deft. Exs. 4-9 for ident.; R. 94][1] but, upon objection

---

[1]The books offered into evidence were *Tropic of Capricorn* by Henry Miller [Deft. Ex. 4]; *Carpetbaggers* by Harold Robbins [Deft. Ex. 5]; *Another Country* by James Baldwin [Deft. Ex. 6]; *Lady Chatterley's Lover* by D. H. Lawrence [Deft. Ex. 8]; and *One Hundred Dollar Misunderstanding* by Robert Gover [Deft. Ex. 9].

by the Commonwealth the offer was rejected [R. 94-95].

Petitioner called James Apple, an attorney-at-law [R. 95], as a witness in his behalf. Petitioner offered to prove through the said witness that the publication involved in the case of *Sunshine Book Co. v. Summerfield* was "more revealing of the body than either of the two publications in question here" [R. 95-96; Deft. Ex. 10 for ident.]. An objection to this offer of proof was sustained by the trial court [R. 96].

The petitioner offered as a witness in his behalf C. L. Werner, who was an investigator employed by counsel for petitioner [R. 96-97]. The petitioner offered to prove that the witness had obtained certain books of art from the Carnegie Public Library in Paducah, books of art which were available to the general public [R. 97-98]. The witness had made copies of pictures out of these various art publications and these pictures were offered into evidence as defendants Exhibits 11 through 19 [R. 98-99]. An objection to the offer of this testimony and all of the exhibits was sustained by the trial court [R. 99-100].

In rebuttal, the Commonwealth called Frederick G. Schlafer, a Pastor of the Baptist Tabernacle, who testified that he had been a minister since 1938 [R. 102]; that "within the last 24 hours" he had looked at the two magazines and that in his opinion the magazines would appeal to the longing for something lewd or lecherous in the average person [R. 103].

There were requests by petitioner for instructions to the jury which were in most cases refused [R. 12-25]. Some of the rulings of the court in this area are

discussed hereafter. Among other things, the trial court refused to instruct the jury that if the jury found that petitioner had a good faith belief that the magazines in question were not obscene, the jury should acquit petitioner even if they personally believed that the magazines were obscene [Prop. Inst. No. 19; R. 17]. The trial court instructed the jury [R. 26-28] and the jury returned a verdict of guilty and fixed the punishment at a fine of $250.00 [R. 11]. Motions made by the petitioner to set aside the verdict, to dismiss the complaint and for a new trial all were denied by the trial court [R. 29-33]. Thereafter, as aforestated, the Court of Appeals of Kentucky denied petitioner's motion for appeal [R. 147] and petitioner's petition for rehearing [R. 135, 151].

How Federal Questions Are Presented.

Upon appeal from the McCracken County Court to the McCracken Circuit Court, petitioner moved before trial that the conviction and fine imposed in the county court be set aside and the complaint against petitioner dismissed. The grounds for the aforesaid motion were that Kentucky Revised Statutes 436.100 is unconstitutional as contrary to, in conflict with, and in violation of the due process clause of the Fourteenth Amendment, and further that the publications involved in the case were protected by the First and Fourteenth Amendments [R. 7]. These federal questions were again raised in a motion to dismiss immediately prior to the commencement of the trial [R. 9], and in the motion for a directed verdict of acquittal at the conclusion of the Commonwealth's testimony [R. 59] and at the conclusion of the entire case [R. 29-32]. In petitioner's motion to

set aside the verdict and for a new trial, the grounds for the motion again included the claims that the magazines were protected by the First and Fourteenth Amendments and were not obscene, that the Commonwealth had failed to prove the alleged obscenity of the publications, that the statute was unconstitutional in violation of the Fourteenth Amendment, and that the trial court had, contrary to the requirements of the First and Fourteenth Amendments, erroneously excluded evidence bearing on issues of contemporary community standards and petitioner's knowledge and intent [R. 30-32].

The same federal questions were raised and discussed in detail by petitioner in support of his appeal to the Court of Appeals of Kentucky [R. 139, 145] and in petitioner's petition for rehearing before the Court of Appeals following the denial of the motion for appeal [R. 148].

Reasons for Granting the Writ.

1. In a constitutional sense, the two magazines herein involved are clearly not obscene and are, therefore, entitled to the protections of the First and Fourteenth Amendments to the Constitituion of the United States. The publications do not exceed customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex and nudity, and, applying contemporary community standards, they do not appeal to the prurient interest of the average person. The magazines in question contain pictures and stories which are comparable to thousands of other pictures and stories appearing in books and magazines which the average person has seen or read

for many years and found entertaining, amusing and informative. If harmless magazines such as are involved herein can be deemed obscene and without constitutional protection, the standards for judging freedom of expression will become at large and endanger all writings dealing with sex.

Under criteria enunciated by both the federal and state courts, the magazines are entitled to First Amendment protection. Although the decision in *Roth v. United States* [*Alberts v. California*], 354 U.S. 476, was rendered without consideration of the material involved, the Solicitor General, in his argument and brief on behalf of the United States in the Supreme Court, urged that obscenity statutes were intended primarily to cover "hard core pornography", material described by the Solicitor General as "black-market" material which is "manufactured clandestinely in this country or abroad and smuggled in" (*Roth v. United States*, Brief for the United States, at 37). An examination of the magazines at issue in this case makes it obvious that they do not come within the class of material upon which the Solicitor General placed his primary emphasis before this Court in *Roth-Alberts*.

Particularly significant are the decisions by this Court which followed *Roth-Alberts*. In *One, Inc. v. Olesen*, 355 U.S. 371, the magazine "One—the Homosexual Magazine" was involved. The material in the magazine was described in the Court of Appeals for the Ninth Circuit as follows:

> "The picture and the sketches are obscene and filthy by prevailing standards . . . stories are obscene, lewd and lascivious . . . offensive to the

> moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. . . ."
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> 241 F. 2d 772, 778 (9 Cir. 1957).

The Court of Appeals condemned the magazine and the material contained therein as obscene, but this Court reversed in a *per curiam* opinion, citing *Roth v. United States.*

In *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; there was involved a nudist magazine which had been meticulously examined by both the District Court and the Court of Appeals. The District Court held that the pictures in the magazine revealing the genitalia of men, women and children were obscene, that the photos of women with "large elephantine breasts" showing "the pubic area" presented an "over-all picture" of "vulgarity, filthy, obscenity and dirt" 128 F. Supp. 564, 572 (D.C. D.C. 1955). The Court of Appeals agreed that the "extensive, particularized descriptions of the offending and offensive material . . . . speak for themselves" 249 F. 2d 114, 118 (D.C. Cir. 1957).

Again, this Court reversed, citing *Roth v. United States.*

The material in *Times Film Corp. v. City of Chicago,* 355 U.S. 35, was described by the Court of Appeals for the Seventh Circuit in these terms:

> ". . . We found that, from beginning to end, the thread of the story is super-charged with a current of lewdness generated by a series of illicit sexual intimacies and acts. . . . The erotic thread of the story is carried without deviation toward any wholesome idea, through scene after scene. . . ."
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> 244 F. 2d 432, 436 (7 Cir. 1957).

This Court reversed in a *per curiam* opinion, citing only *Alberts v. United States.*[2]

With deference, it is submitted that the two magazines in the case herein involved cannot be denied constitutional protection in the light of the aforesaid rulings by this Court. In *Jacobellis v. Ohio,* 378 U.S. 184, 192, it was stated;

> ". . . This Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. . . . This is precisely what the Court did in Times Film Corp. v. City of Chicago, 355 U.S. 35; One, Inc. v. Olesen, 355 U.S. 371; and Sunshine Book Co. v. Summerfield, 355 U.S. 372."

In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, Justice Harlan announced the judgment of the Court reversing the ruling of the Court of Appeals holding that the magazines "Manual", "Trim" and "Grecian Guild Pictorial" were violative of the federal obscenity statute. The Court of Appeals described the magazines as "photographs of nearly nude male models," some of the pictures appearing to be "primary symbols of sexual fantasies of deviants within the homosexual

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[2]See also, *Mounce v. United States,* 355 U.S. 180, reversing 247 F. 2d 149 (9 Cir. 1957). In *Mounce,* District Judge Driver in Washington initially upheld the forefeiture of imported paperbound books seized by the Customs Service as "obscene". The District Judge held that the "emphasis on normally private areas" of nude men and women rendered the books unlawful. *United States v. 4200 Copies Int'l. Journal,* 134 F. Supp. 490, 494 (D.C. Wash. 1955). After reversal by this Court in 1957 and remand by the Court of Appeals, Judge Driver found that none of the publications were "obscene" under the newly enunciated standards of this Court (D.C. Wash., No. 1286).

group" 289 F. 2d 455 (D.C. Cir. 1961). Justice Harlan observed that the most that could be said of the magazines was that they were "dismally unpleasant, uncouth, and tawdry. But that is not enough to make them 'obscene.'" 370 U.S., at 490. Justice Harlan stated that the portrayal of the male nude in the questioned magazines could not be regarded as more objectionable "than many portrayals of the female nudes that society tolerates" 370 U.S., at 490.

The Supreme Court of Ohio described the motion picture film entitled "The Lovers" in *State v. Jacobellis,* 173 Ohio State 22, 179 N.E. 2d 777, 781 (1962), as more than "hard core pornography, *i.e.,* filth for filth's sake. It was worse. It was filth for money's sake." The Court expressed its "complete revulsion" at the film's showing of "an act of perverted obscenity" 179 N.E. 2d at 781.

In the opinion reversing the judgment of the Ohio court (*Jacobellis v. Ohio,* 378 U.S. 184), Justice Brennan stated:

> "We have viewed the film, in the light of the record made in the trial court, and we conclude that it is not obscene within the standards enunciated in *Roth v. United States* and *Alberts v. California,* which we reaffirm here." 378 U.S. at 196.

Justice Goldberg, concurring, also stated that he had viewed the film and that it dealt with a

> "familiar subject in old and new novels, and in current soap operas," expressing the further view that "by any arguable standard the exhibitors of this motion picture may not be criminally prosecuted" 378 U.S. at 198.

Since the decision in *Roth-Alberts*, and the aforesaid subsequent decisions, the federal and state courts have given constitutional protection to magazines comparable in all respects to the so-called two "girlie" magazines involved in the case herein. In *Excellent Publications, Inc. v. United States*, 309 F. 2d 362 (1 Cir. 1962), the Government contended that the context of the magazines involved, when combined with reproduced photographs

> "of provocatively posed nude and partially nude female models makes each magazine as a whole 'obscene' according to the standard laid down by the Court in the Roth case and elaborated upon by Justices Harlan and Stewart in the Manual Enterprises case" 309 F. 2d at 364.

In answer to the argument of the Government, the Court of Appeals succinctly stated:

> ". . . We cannot agree. . . . The pictures of nude and near nude women are titillating and provocative. But so also are some of the greatest works of pictorial art. The pictures in 'The Gent' are no more provocative than those on the covers of many pocket books generally on display in drug stores, newsstands, book stores and like establishments. . . . In short the pictures simply are not the kind of 'hard core pornography' within the reach of the statute construed in the light of the constitutional guarantee of freedom of the press. . . ."
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> 309 F. 2d at 364-365.[3]

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[3]On June 24, 1965, District Judge Templar granted a motion to dismiss a 22-count indictment charging violations of the federal obscenity statute. *United States v. Linetsky*, No. T-CR-582 (D.C. Kans.) unreported. Referring to the magazines therein involved,

The state courts have accepted the view that magazines of the type herein involved are constitutionally protected. In *People v. Richmond County News*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961), the magazine "Gent", containing pictures and articles allegedly importing "debauchery of the sexual faculty" was held not obscene and constitutionally protected.

In *Larkin v. G.I. Distributors, Inc.*, 14 N.Y. 2d 399, 252 N.Y.S. 2d 71, 200 N.E. 2d 760 (1964), the Corporation Counsel of the City of New York brought an action against a magazine distributor for an injunction to restrain the distribution of certain "girlie" magazines on the ground that the magazines were obscene. The actual magazines involved were entitled: "Touch", "Tonight", "Cocktail", "Snap", "Showcase" and "Sir Knight". The complaint was dismissed in the Supreme Court (41 Misc. 2d 165, 245 N.Y.S. 2d 553) and the Appellate Division affirmed the judgment of dismissal holding that the magazines were not obscene (19 A.D. 2d 609, 241 N.Y.S. 2d 159). On appeal to the Court of Appeals, the Corporation Counsel argued that the "six magazines in question consist essentially of masses of photographs of nude or semi-nude women in sexually

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the Court stated in its opinion, among other things: ". . . [U]nder the decided cases, 'Girlie' magazines and illustrations of females in the nude are not classified as 'hard-core pornography'. See infra, *Excellent Publications*. . . . [T]he Court feels under the announced rule that he must accept the declaration that 'Girlie' magazines containing nude or partially nude young women, usually portrayed in seductive poses, without exposure of genitalia, are not to be held as 'hard core pornography'." See also, *United States v. Wasserman* (D.C. Kansas) No. T-CR-5811, decided June 29, 1965, also by District Judge Templar, dismissing a 22-count indictment charging the mailing of allegedly obscene movie films.

provocative poses, with an accompaniment of sex-centered stories or comments depicting or discussing in suggestive and inflammatory detail, sexual episodes and erotic activities, including sexual intercourse." (*Larkin v. G. I. Distributors, Inc.*, Appellant's Brief on behalf of the Municipality, p. 2.)

The Court of Appeals of New York affirmed the judgment of the lower courts with the following opinion:

> "Judgment affirmed, without costs (People v. Richmond County News, 9 N.Y.2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 [1961]; Butler v. Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412 [1957]; Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [1957]; Kingsley Books v. Brown, 354 U.S. 436, 77 S.Ct. 1325; 1 L.Ed. 2d 1469 [1957]; Alberts v. California, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 [1957]; One, Inc. v. Olesen, 355 U.S. 371, 78 S.Ct. 364, 2 L.Ed.2d 352 [1958]; Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512 [1959]; Smith v. California, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 [1959]; Manual Enterprises v. Day, 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 [1962])."[4]

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[4]On June 17, 1965, the Appellate Division of the Circuit Court of Connecticut in *Connecticut v. Martin, et al.*, Nos. CR 2-14187 AP and CR 2-14188 AP, unreported, reversed a judgment confiscating and destroying as a nuisance certain nudist magazines alleged to be obscene. The nudist magazines involved were entitled: "Urban Nudist", "The Western Nudist", "American Nudist" and "Suntan".

On February 16, 1965, the Honorable Walter R. Evans, a Judge of the Superior Court of the State of California for the County of Los Angeles, dismissed a count of an indictment in *People v. Luros, et al.*, No. 295183, unreported, which alleged

It is evident that customary freedom of expression as shown by the aforesaid rulings and opinions of the courts throughout the country embraces the two magazines involved herein. The articles contained in the publications do not exceed the limits of candor in the description of sex found in a multitude of writings which are today accepted as bestsellers and which have in many cases been judicially determined to be entitled to constitutional protection. See, for example, *Tralins v. Gerstein*, 378 U.S. 576 (*Pleasure Was My Business*); *Grove Press, Inc. v. Gerstein*, 378 U.S. 577 (*Tropic of Cancer*); *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433, affirming 175 F. Supp. 488 (*Lady Chatterley's Lover*); *Haldeman v. United States*, 340 F. 2d 59 (10 Cir. 1965) (booklets entitled: "Questions and Answers Involving Sexual Ethics and Sexual Esthetics"; "Questions and Answers on Sex and the American Attitude"; "Questions and Answers on Sex Physique Disparity"; "Questions and Answers on the Sex Life and Sexual Problems of Homosexuals of Both Sexes"; "Questions and Answers About Oragenital Contacts"; "Questions and Answers about Cunnilingus"; "Questions and Answers on Undinism"; and "Revelations of a Sexologist").[5]

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that the following magazines were obscene: "Tip Top", Vol. 3, Nos. 1, 2, 3, 4 and 5, "Nylon Jungle", Vol. 1, No. 3 and No. 4 and Vol. 2, Nos. 1 and 2, "Sun Era", Vol. 1, Nos. 8, 10 and 11, "Photo Field Trip", Vol. 1, No. 6, "Urban Nudist", Vol. 1, Nos. 10, 11, and 12. The Superior Court stated that the aforesaid magazines "do not fit within the definition of obscenity as laid down by the United States Supreme Court" [Rep. Tr. p. 4].

[5]In *Kansas, Ex rel. Londerholm etc., v. Quantity of Copies of Lewd, Lascivious and Obscene Books, Titled: "Sin Hooked," "Bayou Sinners," "Lust Hungry," "Shame Shop," "Fleshpot," "Sinners Seance," "Passion Priestess," "Penthouse Pagans," "Shame Market," "Sin Warden," "Flesh Avenger,"* No. C-3595-64, unreported, the Honorable Tom Raum, a Judge of the District

It is respectfully submitted that the publications involved herein are far less candid than material found constitutionally protected by the aforesaid decisions. Clearly, these magazines do not constitute criminal speech and the application of a state obscenity statute to such constitutionally protected material can only have a "chilling effect upon the exercise of First Amendment rights" (*Dombrowski, et al. v. Pfister*, 380 U.S. 479, 487.

The Kentucky statute, as construed and applied to the magazines herein, is clearly unconstitutional and does violence to the free speech and due process provisions of the First and Fourteenth Amendments. In the light of the decided cases, both in this Court and throughout the land, the judgment of conviction herein, it is submitted, should be summarily reversed.

Court of Sedgwick County, Kansas, held in July 1965 that all the named writings were constitutionally protected.

On June 14, 1965, the Honorable Joseph A. Sprankle, Jr., a Judge of the Superior Court of the State of California for the County of Los Angeles, in *People v. Luros, et al.*, No. 295183, *supra*, dismissed another count of the indictment alleging that certain named books were obscene. The books were entitled: *Lesbian Sin Song, Two Women in Love, Counterfeit Lesbian, Lesbian Captive, Lesbians in White, The Girls at Wendy's, The Three Way Apartment* and *Honey Lips*. The Court found that none of the books involved exceeded contemporary community standards nor were any of the books utterly without redeeming social importance.

See also, *People v. Birch*, 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sup. Ct. Cr. 1963) [books entitled: *Sex Kitten, Clip Joint Cutie, The Wild Ones, The Hottest Party in Town, Passion Pit, Bedroom at the Top, Butch*, and *College for Sinners*, described as containing "a great number of descriptions of sexual activity which, in many cases, are only tenuously associated with the plot and story line" (243 N.Y.S. 2d at 528)—held not obscene and indictment dismissed]; *People v. Druss*, N.Y. Sup. Ct. Cr. #431-63, September 6, 1963 [obscenity indictment dismissed—books entitled: *Strange Breed, Pagan, Swing Low Sweet Sinner, Sex Plan, A Rage Within, Horizontal Secretary* and *None But the Wicked*].

2. Kentucky Revised Statutes 436.100, on its face and as construed and applied by the state court, violates the free speech and press and due process provisions of the First and Fourteenth Amendments, as well as other safeguards contained in the Bill of Rights which are subsumed into the due process provisions of the Fourteenth Amendment.

(a) The statute provides that the sale of any magazine found by the trier of fact to be obscene "shall be *prima facie* evidence that the seller . . . who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure" [K.R.S. 436.100(4)]. In other words, the mere sale of a book or other writing by a bookseller in a retail establishment is on its face evidence that the vendor had knowledge of the "obscene character" of the book or writing sold.

It is submitted that such construction of the statute does no more than impose the same strict or absolute criminal liability for the sale of an allegedly obscene book as was condemned by this Court in *Smith v. California*, 361 U.S. 147, and removes procedural due process safeguards for freedoms of speech and press which was held violative of the Constitution in *Speiser v. Randall*, 357 U.S. 513.

It will be observed from the provisions of the statute that booksellers are penalized for the sale of books or other writings found ultimately to be obscene, even though they had not the slightest notice of the character of the books they sold. It follows that the tendency of the bookseller will be to restrict the sale of all books and writings to those which he has inspected. These

restrictions will inevitably restrict the public's access to reading matter.

> "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded." 361 U.S., at 154.

The only circumstance set forth in the statute to justify the elimination of proof of *scienter* is the fact that a book or other writing is sold with "intent to sell" such book or other writing. Such a circumstance is clearly unsupportable as a justification under the Constitution of the United States for the elimination of the *scienter* requirement. To permit a finding of knowledge of the alleged obscenity of a book or other writing, based solely on an intent to sell the book or other writing, is to cast upon the bookseller the same onerous burdens with the same consequent restrictive tendencies as are present in any statute which eliminates the *scienter* requirement. *Smith v. California,* 361 U.S. 147. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 283-284; *Garrison v. Louisiana,* 379 U.S. 64, 73-74; *Henry v. Collins,* 380 U.S. 356.

In *Smith v. California, supra,* this court held that the prosecution in an obscenity case was required to plead and prove that the accused knew that the material was obscene. This constitutional requirement has been reiterated in court decisions. See, *State v. Locks,* 397 P. 2d 949 (Ariz., 1964); *State v. Sul,* 146 Conn. 78, 147 A.

2d 686, 691 (1958); *Demetropolos v. Commonwealth,* 342 Mass. 658, 175 N.E. 2d 259, 262 (1961); *State v. Oman,* 261 Minn. 10, 110 N.W. 2d 514, 520 (1961); *Cohen v. State,* 125 So. 2d 560, 563 (Fla. 1961); *State v. Hudson County News Co.,* 35 N.J. 284, 173 A. 2d 20, 25 (1961). See also, Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L.Rev.5, 103-108 (1960). See also, *Freedman v. Maryland,* 380 U.S. 51. ". . . [T]he burden of proving that the film is unprotected expression must rest on the censor" 380 U.S., at 58.

Under the statute herein, the State has refused to bear the burden of producing evidence of *scienter* as part of the proof of a bookseller's guilt. The State requires the bookseller to bring forth proof and persuade the trier of the fact that he did not have knowledge of the obscenity of the book. This burden is placed upon the bookseller without any proof by the prosecution that the bookseller had such guilty knowledge. The bookseller may be convicted without proof of *scienter* and despite his protestations so long as the fact-finder believes that the book or other writing involved is obscene. Clearly under such circumstances, a bookseller will prudently refrain from dealing with any book or writing involving sex in order to avoid assuming such precarious burden. How can a bookseller fairly sustain the burden of proving lack of *scienter* when the mere sale of the book is *prima facie* evidence of *scienter* upon which the trier of facts can return a finding of guilt if the trier of the facts believes that the book or writing is obscene?

In practical operation, therefore, the *prima facie* presumption which the statute creates produces the same inhibition on the circulation of constitutionally protected material as was attempted by the Los Angeles Ordinance in *Smith v. California.*

> "The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech." *Speiser v. Randall,* 357 U.S. 513, 529.

It is plain, and this apart from free press considerations, that the statute here improvises a presumption which runs contrary to the due process provisions of the Constitution. To permit an inference of *scienter* from the mere sale of a book found by a fact-finder to be obscene is to open the door wide for the conviction of innocent booksellers. A book or writing which a fact-finder has found obscene will inevitably lead the fact-finder to subjectively assume that what the fact-finder knows the bookseller should also have known. Such a conclusion is of course arbitrary, capricious and irrational. Proof alone of the sale of a book or writing is not such circumstance from which one can rationally infer a conclusion that a bookseller was aware of its obscene character. *Tot v. United States,* 319 U.S. 463; *Manley v. Georgia,* 279 U.S. 1; *Bailey v. Alabama,* 219 U.S. 219; *Eastern & Atl. R. Co. v. Henderson,* 279 U.S. 639.

> ". . . [T]he legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible." *Tot v. United States, supra,* at 469.

Moreover, the statute here on its face is patently capable of many unconstitutional applications, capable of sweeping within its ambit constitutionally protected expression and of inhibiting the circulation of material protected by the provisions of the First Amendment. As written, the statute cannot stand consistent with the broad guarantees of the Bill of Rights. The statute places limitations on free speech and press guarantees, undermines procedural safeguards particularly required in prosecutions involving speech and press, and unlawfully compels persons to take the stand in criminal prosecutions and prove the lawfulness of their conduct under onerous and unfair circumstances. *Thornhill v. Alabama*, 310 U.S. 88; *Smith v. California*, 361 U.S. 147; *Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58; *Speiser v. Randall*, 357 U.S. 513, 526; *Tot v. United States*, 319 U.S. 463, 469, 473; *Thompson v. City of Louisville*, 362 U.S. 199, 206 and cases cited in n.13; *New York Times Co., et al. v. Sullivan*, 376 U.S. 254, 271, 277-280, 283-288; *Freedman v. Maryland*, 380 U.S. 51, 57-58.; *Malloy v. Hogan*, 378 U.S. 1, 6-8.

(b) The vice of the statute on its face is further compounded by the construction and application of the statute to the petitioner here.

The petitioner requested the trial court to instruct the jury that if the jury found that the petitioner had a good faith belief that the magazines in question were not obscene, then the jury should acquit petitioner, even if they believed the magazines were obscene [Prop. Inst. No. 19; R. 17]. Other instructions requested by the petitioner on the issue of *scienter* were also refused by the trial court [See, Prop. Inst. Nos. 1, 6, 7, 8;

R. 12-14]. Thus, the trial court excluded any possibility of acquittal upon the basis of honest ignorance. Under the Kentucky statute, therefore, an honest mistake as to whether the writing involved is obscene is not an excuse. Such construction and application of the statute simply means that the Kentucky statute here is in no way different from the enactment which this Court considered in *Smith v. California.*

By construction and application of the law, Kentucky has enunciated the rule that in obscenity prosecutions there is in fact a conclusive presumption of guilty knowledge and intent solely from the sale of the book. Under such circumstances, the statute is vulnerable on due process and free speech grounds. To relieve the prosecutor in an obscenity action from the burden of proving *scienter,* and then to hold that even honest ignorance by the accused of the alleged obscenity of the writing is not a defense, constitutes a broad departure from the specific constitutional guarantees and the rulings of this Court. *Speiser v. Randall,* 357 U.S. 513, *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58; *A Quantity of Copies of Books, et al. v. Kansas;* 378 U.S. 205.

Professors Lockhart and McClure suggest that "the scienter requirement has not been met if, . . . the seller honestly believed that the book was not obscene." Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 103, 107 (1960). The authors state that:

> ". . . the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial rul-

> ing whether a book is 'obscene,' even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very 'self-censorship . . . privately administered' and 'timidity in the face of absolute criminal liability' that the Court sought to avoid by imposing the scienter requirement." (*Id.*, at 106.)

Moreover, the elimination of the defense of honest ignorance of obscenity is a denial of due process "in the primary sense", the right to be heard in one's defense. *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Eliott,* 167 U.S. 409, 417. If it is an offense to sell a book with knowledge of either its contents or its character [K.R.S. 436.100(2)], then it clearly must be constitutionally relevant for an accused to testify that he in good faith neither knew the contents nor the obscene character of the writing.

(c) Moreover, the unlawful construction and application of the statute is further exemplified by the rulings of the trial court.

Every effort on the part of petitioner to prove a lack of knowledge of the contents or the alleged obscenity of the two magazines was rebuffed by the trial court. Petitioner was not permitted to prove either through his own testimony or through the testimony of his employees that it was impossible to inspect each of the writings sold at Readmore [R. 63-64, 83-84]. Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office

Department, that he had written to all his publishers to that effect, and that he had instructed his employees not to distribute magazines which had no second-class mailing permits. All of these offers were rejected [R. 63-70, 83; Deft. Ex. 1 for ident.]. Furthermore, petitioner's offer to prove that a wide variety of comparable magazines were sold by him without bar or restriction of any governmental authority was also rejected [R. 69-70]. The short of the matter is that every effort by petitioner to prove, in fact, that he had no knowledge of the obscene character of the magazines was thwarted.

The due process provisions of the Constitution were intended to guarantee procedural standards adequate and appropriate to protect at all times individuals charged with or suspected of crime by persons holding positions of power and authority. *Chambers v. Florida*, 309 U.S. 227.

> "This Court has never attempted to define with precision the words 'due process of law', nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense." *Holden v. Hardy*, 169 U.S. 366, 389-390.
>
> "Can it be doubted that due process of law signifies a right to be heard in one's defense? . . ." *Hovey v. Elliott*, 167 U.S. 409, 417.
>
> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings

> in which evidence is received and weighed by the trier of the facts. . . . If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." *Morgan v. United States,* 298 U.S. 468, 480-481.

The trial court licensed the jury to make its own subjective determination on the issue of *scienter* and deprived petitioner of basic procedural and substantive freedoms guaranteed by the Constitution.

It is submitted, in the light of all of the aforesaid discussion, that the statute here, on its face and as construed and applied, cannot stand consistent with the requirements of the provisions of the First and Fourteenth Amendments, as well as the procedural guarantees contained in the provisions of the Fifth and Sixth Amendments entitling an accused to be informed of the nature and character of the accusation made against him and to freedom from compulsory self-accusation.

3. The exclusion of constitutionally relevant evidence on the issue of contemporary community standards also resulted in an arbitrary deprivation of petitioner's liberty without due process of law and an abridgement of free press guarantees.

During the trial, petitioner offered into evidence comparable writings which had been sold and accepted in the community [Deft. Exs. 4-9 for ident.], but an objection to their introduction was sustained by the Trial Court upon the ground that "we only have the two magazines on trial" [R. 94-95]. An attempt to introduce into evidence a court ruling holding a comparable publication not to be obscene and constitutionally protected

was also thwarted [Deft. Ex. 10 for ident., R. 95-96]. Comparable pictures taken from art books contained in the public library in Paducah were also excluded [Deft. Exs. 11-19 for ident.; R. 98-100].

Thus, cogent and salient evidence bearing on the issue of contemporary community standards was excluded by the Trial Court. Prior to the decision by this court in *Roth-Alberts,* decisions in the obscenity area were generally based on the alleged effect of the material upon those highly susceptible persons whom the material was likely to reach. This court's decision, however, rejected the *Hicklin* test as unconstitutionally restrictive, and substituted as one of a number of ingredients for judging obscenity the criterion of contemporary community standards. As this court's opinions have made clear, from *Roth* to *Jacobellis,* a judgment of conviction in an obscenity prosecution can no longer stand, unless there is proof that the publication first exceeds contemporary standards and, further, appeals to the prurient interest of the average person and is utterly without redeeming social importance.

It appears plain, therefore, that when relevant evidence on the issue of community standards is offered by an accused in an obscenity prosecution, and excluded, the case involves not only due process in the primary sense but also provisions of the First Amendment affecting freedoms of speech and press. The exclusion of evidence establishing customary freedom of expression in the Nation deprives the accused of essential evidence intended to prove that the writing in question is constitutionally protected.

The American Law Institute had declared in 1957 that its test for judging obscenity was "designed to as-

sure reception" of evidence bearing on the issue. A.L.I., *Model Penal Code* (Tent. Draft No. 6, 1957) 44. See, Section 207.10(2) of Tent. Draft No. 6; *supra*, 1-2, and Comments in Tent. Draft No. 6, at 10, 11, 29-31, 39-43, 43-46, 46-49. See also, American Law Institute, *Proceedings*, 34th Annual Meeting (1957) 158-174, 187, 194, 202. The Institute stated on the issue of "customary limits of candor" that in any obscenity prosecution, evidence should be admissible to show "the degree of public acceptance of the material in this country". Tent. Draft No. 6, *supra*, 2, 44.

In *Smith v. California*, 361 U.S. 147, the issue of exclusion of evidence in obscenity prosecutions was discussed by Justices Frankfurter and Harlan. Justice Frankfurter stated:

> ". . . Since the law through its functionaries is 'applying contemporary community standards' in determining what constitutes obscenity, *Roth v. United States*, 354 U.S.476, 489, it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those 'contemporary community standards' are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge."
>
> 361 U.S. at 165.

Justice Harlan stated:

> ". . . I agree with my Brother Frankfurter that the trier of an obscenity case must take into account 'contemporary community standards', *Roth v. United States*, 354 U.S.476, 489. . . . Appellant attempted to compare the contents of the work with

> that of other allegedly similar publications which were openly published, sold and purchased, and which received wide general acceptance. . . . In my opinion this conviction is fatally defective in that the trial judge, as I read the record, turned aside *every* attempt by appellant to introduce evidence bearing on community standards. . . . This had the effect of depriving appellant of the opportunity to offer any proof on a constitutionally relevant issue."
>
> 361 U.S. at 171-172.

The Courts following *Smith* have recognized that the exclusion of comparison testimony constitutes a denial of due process and renders the proceedings in an obscenity prosecution constitutionally defective. The Courts have accepted the view that the enunciation of the "contemporary community standards" principle in obscenity cases means that comparison testimony is fully relevant, and that since obscenity cases are open to broad review on appeal, the admission of such evidence is necessary to provide a record upon which appellate judges can base a constitutional judgment. *In re Harris,* 56 Cal. 2d 879, 16 Cal. Rptr. 889, 336 P. 2d 305 (1961); *Yudkin v. State,* 229 Md. 223, 182 A. 2d 798 (1962); *Zenith International Film Corp. v. City of Chicago,* 291 F. 2d 785, 789-790 (7 Cir., 1961); *Grove Press, Inc. v. Christenberry,* 175 F. Supp. 488, 502 (D.C. N.Y., 1959), aff'd. 276 F. 2d 433 (2 Cir., 1960).

In summary, the wholesale exclusion of constitutionally relevant evidence by the Trial Court deprived petitioner of a fair trial and his liberty and property without due process of law, and constituted a serious abridgment of free press provisions of the Constitution.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted, and the judgment of conviction reversed.

Respectfully submitted,

STANLEY FLEISHMAN and
CHAS. A. WILLIAMS,
Counsel for Petitioner.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

Judgment of the McCracken Circuit Court.

On the 28th day of February, 1964, the following order was entered herein, to-wit:

Commonwealth of Kentucky, Plaintiff, v. #9443 "Sale of Obscene Literature" William L. Austin, Defendant.

Came the jury empaneled herein on yesterday. Came all parties in interest and the trial of this case was resumed. At the conclusion of all the evidence, the defendant offered (51) separate instructions, some of which the Court gave or incorporated in his instructions and the remainder of which were refused, to which defendant objects and excepts. The Court gave to the jury Instructions Nos. 1, 2, 3, 4, 5, 6, 7, 8, & 9, to which both parties object and except. Ordered that all said instructions, both those offered and refused and those given by the Court, be filed and made a part of the record herein without being spread upon the order book. Argument of counsel being concluded the jury retired for deliberation and returned into open court the following verdict: "We, the jury, find the defendant, William L. Austin, guilty and fix his punishment at $250.00 fine (Two Hundred & Fifty Dollars) /s/ Fred M. Herde, Foreman".

Wherefore it is Adjudged by the Court that the Commonwealth of Kentucky, recover of defendant, William L. Austin, the sum of Two Hundred Fifty Dollars ($250.00) Dollars in fine, and its cost expended, for all of which capias pro fine is awarded.

BOND FOR THE PURPOSE OF APPEAL IS SET AT $350.00.

APPENDIX B.

Per Curiam Opinion of Court of Appeals.

Rendered: January 22, 1965.

Court of Appeals of Kentucky.

William L. Austin, Appellant v. Commonwealth of Kentucky, Appellee.

Appeal from McCracken Circuit Court, C. Warren Eaton, Judge.

PER CURIAM

Motion for an appeal from a judgment of conviction of offering obscene literature for sale contrary to KRA 436.100 and imposing a fine of $250.00 and costs.

We find no error in the trial, and the motion for an appeal is overruled.

Moremen, C.J., dissenting.

Attorney for Appellant: Charles A. Willaims, Paducah, Kentucky.

Attorneys for Appellee: Robert F. Matthews, Atty. Gen., John B. Browning, Asst. Atty. Gen., Frankfort, Kentucky. Albert Jones, Commonwealth Atty., Paducah, Kentucky.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, . . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. The pertinent provisions of Kentucky Revised Statutes, section 436.100 are:

> "(1) Where the term 'person' is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.
>
> "(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show, has in his possession with intent to sell, lend, give

away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

. . .

"(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)."

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In The

Supreme Court of The United States

October Term, 1965

No. 453

WILLIAM L. AUSTIN.....*Petitioner*

v.

COMMONWEALTH OF KENTUCKY.....*Respondent*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT

The Commonwealth of Kentucky contends that certiorari should be denied in the present case for the following reasons:

1. The two publications in question are obscene under the test prescribed by this Court, and the jury in the McCracken circuit court correctly found them to be so according to contemporary community standards.

2. Section 436.100 of the Kentucky Revised Statutes is constitutional on its face and petitioner's right of freedom of speech was not abridged nor was he denied due process by the manner in which it was applied.

3. Petitioner's constitutional rights were not violated by refusal of the trial court to permit petitioner to introduce certain evidence on the issue of contemporary community standards.

ARGUMENT

I. THE TWO MAGAZINES IN THIS CASE ARE OBSCENE.

Under the test for obscene literature set out in *Roth v. United States*, 354 U.S. 476 (1957), in order for a publication to be declared obscene and beyond the protection of the Constitution it must appear that (1) the work is utterly without redeeming social importance, (2) the material goes substantially beyond customary limits of candor in description or representation of such matters, and (3) to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

The two magazines, "Spree" and "High Heels", which a jury of McCracken County, Kentucky, found to be obscene are "girlie" magazines containing numerous photographs of nude or semi-nude females in provocative or suggestive poses, some of them in rather intimate boudoir-type surroundings. In addition to the nude photographs there are a few stories whose sole theme is illicit sexual adventure. The advertisements in these two magazines are offensive by their terms and are designed to induce readers to tap further sources of indecent material. When the general make-up of the magazines and their over-all impact is considered it is clear that they are salacious and patently offensive.

It can hardly be doubted that these issues of "Spree" and "High Heels" are utterly without redeeming social importance. A jury composed of a cross-section of the community found that the material goes substantially beyond the customary limits of candor approved and accepted in Western Kentucky for newsstand magazines sold to the public. It is obvious that the dominant theme of the material taken as a whole appeals to prurient interest. In fact, the magazines were published for no other reason except to appeal to such interest.

This Court has declined to review three cases in which "girlie" magazines were held to be obscene by state courts under the test set out in the Roth-Alberts case, 354 U.S. 476.

In *State v. Chobot*, 12 Wis. (2) 110, 106 N.W. 2d 286 (1961) it was held that magazines were obscene which contained numerous photographs of nudes and semi-nudes in provocative poses, a great many of them on beds and davenports, with the pictures providing an appropriate setting for accompanying sex stories. One of the magazines was "Spree." The appeal to this Court was dismissed for want of a substantial federal question. *Chobot v. Wisconsin*, 368 U.S. 15. In *Monfred v. State*, 226 Md. 312, 173 A. 2d 173 (1961) although the court was of the opinion that "mere nudity in and of itself" was not obscene it found magazines of the same type involved in this case to be outside the protection of the Constitution:

> "But when each of the other five so-called 'girlie' magazines—Candid, Consort, Sextet, Cloud 9 and Torrid—is taken as a whole, that is, when the pictures reproduced therein are examined in conjunction with a perusal of the textual material, it is apparent that all of these publications are obscene within the meaning of the statute as well as under the obscenity test approved by the majority in the Roth-Alberts case, supra. All of them, without exception, present numerous pictures or drawings of nude or semi-nude women showing what the State characterized as 'come hither' expressions and poses interspersed with pointedly suggestive sex stories so placed that a reader if he needs visual aid in following the story has only to glance at the opposite page for additional stimulation. All of these five publications were obviously calculated to excite lustful thoughts in the mind of the reader. Thus, having made a determination of our own that the findings of fact were correct, we are unable to say that the trial court was in error as to the evidence in convicting all of the defendants for selling one or more of these magazines; nor did the lower court reach the wrong conclusion as to the law."

This Court denied certiorari in *Monfred v. Maryland*, 368 U.S. 953. See also *Goldstein v. Virginia*, certiorari denied, 372 U.S. 910 (1963).

The majority of state courts which have considered the matter are in agreement that "girlie" magazines of the type involved in this case are obscene. Thus, in *State v. Andrews*, 150 Conn. 103, 186 A. 2d 546 (1962) the court stated as follows:

> "The episode which is the subject of the first count of the defendant's two-count conviction occurred on June 17, 1960. On that occasion, a state police officer purchased the two magazines, heretofore mentioned. 'Modern Man—1960 Yearbook of Queens,' priced at $1, is replete with photographs of nude, semi-nude and indecently clad females. The subjects of a substantial majority of these photographs are posed against backgrounds and in postures highly suggestive of lascivious activity. Furthermore, this magazine, in the case of both photographs and text, is utterly devoid of any literary or artistic value. Although there are varying degrees of suggestiveness in the photographs, their cumulative effect and dominant theme lack any rational purpose other than to appeal to the prurient interest of the average man."

In *State v. Hudson County News Co.*, 78 N.J. Super. 327, 188 A. 2d 444 (1963) and in the opinion of the Supreme Court of New Jersey in *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 (1963) we find that the court was of the opinion that six "girlie-type" magazines were obscene. One of the magazines was "Spree." See also on the subject of this type of magazine *Cincinnati v. King*, 152 N.E. 2d 23 (Ohio, 1958); and *Gent v. State*, decided by the Arkansas court, 33 U.S. Law Week 2675.

It is submitted that the publications in question are not entitled to the constitutional guaranty of free speech since the jury had ample grounds for finding them obscene.

II. THE KENTUCKY STATUTE REQUIRES SCIENTER AND IS NOT UNCONSTITUTIONAL BECAUSE IT RAISES A REBUTTABLE PRESUMPTION OF KNOWLEDGE FROM THE FACT OF SALE. THE STATUTE WAS NOT CONSTRUED OR APPLIED IN AN UNCONSTITUTIONAL MANNER.

The Kentucky obscenity statute, KRS 436.100, did not until the year 1962 require by its terms that the seller of the obscene material be shown to have had knowledge of its nature or contents. As a result of the 1962 amendment the statute now expressly requires that the sale of an obscene magazine be "with knowledge of the contents or character." Subsection 4 of KRS 436.100 provides that the sale of any magazine found to be obscene shall be prima facie evidence that the seller had knowledge of the obscene character of the printed matter.

The Kentucky statute is not the same as that condemned by this Court in *Smith v. California*, 361 U.S. 147 since (1) it expressly requires that the sale be with knowledge of the contents or character of the publication, (2) the defendant may introduce evidence that he did not in fact have knowledge of the contents or character of the material and such evidence is relevant to the prosecution, and (3) the state is required to introduce evidence from which the jury could reasonably conclude that the seller had knowledge of the character of the material sold. The trial court in its instructions told the jury that it must believe from the evidence beyond a reasonable doubt that the defendant "had knowledge of the contents and the character" of the magazines sold (R. 26). The trial court did not inform the jury as to any presumption favoring the Commonwealth.

A statute creating a rebuttable presumption of knowledge of contents or character from the fact of sale is not unconstitutional. Such presumption was proposed by the American Law Institute in Section 207.10 of the 1957 draft of the Model Penal

Code and Section 251.4(2) of the 1962 Model Penal Code. It would seem proper to require that a seller of goods have general knowledge of the material making up his business and a presumption of such general knowledge from the fact of sale is both logical and reasonable. Thus, in *Cincinnati v. King*, 168 N.E. 2d 633 (Ohio, 1960) the court concluded that the knowledge required by this Court in Smith v. California was a general knowledge of the general, ordinary and usual contents of the books in the store, rather than any specific knowledge of the contents of a particular book. A reasonable presumption of such knowledge was thought by the Ohio court to arise from the fact of sale of the book in the defendant's business:

> "It seems utterly unreasonable and completely unrealistic to hold a book store proprietor responsible for such obligations as taxes on his property and merchandise, the payment of his utility bills, safety and sanitary measures in his store, federal withholding taxes, and all the other reasonable and necessary requirements to the legal and successful operation of his establishment, but allow him in an anti-obscenity prosecution to disclaim general knowledge of what he has for sale. Does not an automobile dealer know whether or not he has Corvairs or Cadillacs on his showroom floor. Does not a grocery owner know generally what vegetables he displays for sale? Does not the proprietor of a men's store know generally whether or not he has brown or green ties for sale, even though he might not be able to describe each one in detail? The answers obviously must be yes. We do not think the language of the United States Supreme Court in the *Smith case* is intended to allow booksellers to be ostriches with their heads buried in the sand. Furthermore, we are of the opinion that if and when the United States Supreme Court has before it for determination the extent of knowledge and notice required for a bookseller, it will decide that a bookseller cannot with impunity look the other way and deny any knowledge of his merchandise. We also believe that the scienter, made an indispensable factor by the *Smith case*, can be minimal, that is, only what is reasonable

> under the circumstances. It would not surprise us to find the highest court of the land sustaining a law or ordinance which made mere possession of books and especially magazines by booksellers prima facie proof of knowledge of their general and usual content, a presumption which could be rebutted if justified."

Mr. Justice Frankfurter in *Smith v. California*, 361 U.S. at p. 164 stated:

> "A bookseller may, of course, be well aware of the nature of a book and its appeal without having opened its cover, or, in any true sense, having knowledge of the book."

The Commonwealth in this case produced sufficient evidence to warrant a jury concluding that the defendant had knowledge of the character of the two magazines upon which the prosecution was based. The magazines were stapled shut at the time of their purchase (E. 3). These two magazines along with a number of others of the same type had been isolated from the general run of magazines and placed in a special rack behind the cashier's stand (E. 4). Defendant admitted that the purpose of stapling the magazines and segregating them in a special rack was to make sure that their sales were limited to adults only (E. 31, 37). Defendant had conferred with local ministers at a meeting a year before the sale in question and had been advised by the ministers that they had been receiving complaints concerning the general class of magazines known as "girlie" magazines which were being sold in defendant's store (E. 18, 19, 37). The defendant was unquestionably aware of the objectionable features of this class of magazines. The photographs on the covers of the magazines are such as to give ample notice of the contents even upon casual inspection.

Mr. Justice Brennan stated for the Court in *Smith v. California*, 361 U.S. 154:

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his

awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

It has been held that "circumstances" sufficient to warrant an inference of knowledge of the contents of an obscene publication are the stapling of the books, placing them behind the cashier's stand on a separate rack, the charging of a price which is apparently much too high considering the cheap nature of the publication, limitation of sales to adults only, and the nature of the pictures on the covers. *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711 (1964); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (1963); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858 (1964); *Connecticut v. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715 (1963).

The defendant was permitted to testify that he did not know that issues of the two magazines, "Spree" and "High Heels" were on sale in his store and no one had advised him of this (E. 34). However, he admitted that he had received complaints from ministers regarding "girlie" magazines in general and had as a consequence ordered that all such magazines be segregated and stapled (E. 30, 31). Objections were sustained to defendant's attempt to testify that it was impossible for him to know what he was selling because of the quantity of material which he handled in his business (E. 26, Q. 41, 27). Objections were also sustained to defendant's attempt to testify as to his partial use of a second class mailing permit as a guide to obscenity, and the meaning of issuance of such permit (E. 26, 28). It is no defense to a prosecution of this sort that Federal post office officials had allegedly approved a publication as non-obscene by issuing a mailing permit. See on the question of the mailing permit *People v. Cohen,* 205 N.Y.S. 2d 481 (1960) at pages 486, 487.

There was ample evidence in this case of scienter.

III. PETITIONER WAS PERMITTED TO INTRODUCE EVIDENCE THAT MAGAZINES OF THE SAME TYPE AS THE TWO IN QUESTION HAD BEEN SOLD AND ACCEPTED IN THE COMMUNITY. EXHIBITS OF DISSIMILAR AND NON-COMPARABLE MATERIAL WERE PROPERLY REFUSED.

The trial court in this case instructed the jury that the term "contemporary community standards" as used in the instructions did not refer to the standards of a particular locality but to the standard of "the contemporary society of this country at large or as a whole." (R. 27). It was pointed out in *Gent v. State*, decided by the Arkansas Supreme Court, 33 U.S. Law Week 2675, that a majority of this Court has not adopted the rule that the "community standard" must be the standard of the nation as a whole.

It is submitted that there is perhaps no such thing as a national standard. The material should be judged by the prevailing standards of the local community and a jury representing a cross-section of that community should be presumed to be aware of what the community standards are.

The petitioner as a wholesale as well as a retail dealer was permitted to testify that for a number of years he had sold the same type of magazine as the two for which he was being prosecuted and "there has never been an objection that we didn't observe and correct and adjust" (E. 32). Apparently there had been complaints heretofore and when the title of the particular publication was given to petitioner some action was taken to remove it or restrict its sale. Petitioner produced an expert witness, Dr. Lowry, who was permitted to testify that magazines of the same type as the two for which defendant was being prosecuted had been sold in the entire area for many years and accepted by the communities (E. 52).

The paperback books tendered by petitioner were properly

rejected as exhibits since they are a different class of material and are not comparable to the magazines on which the prosecution was based. "Spree" and "High Heels" have no literary value whatever, although this may not be true of the paperback books. Pictures of statues and other art objects taken from publications in the local public library were also properly rejected as exhibits since they are not similar or comparable to "girlie" magazines. It would be absurd to say that because nudity is accepted in recognized works of art it is also condoned and accepted by the community when utilized in the fashion of the "girlie" magazines. The nudist magazine involved in the *Sunshine Book Co. v. Summerfield* case was not similar or comparable to "Spree" and "High Heels" in that in the case of a legitimate nudist publication the models are not usually placed in provocative or sexy poses, there is no undue emphasis on sex and the publication purports to be justifiable as nothing more than a candid portrayal of the normal events in a colony of sun worshippers. Not all so-called nudist magazines are non-obscene. See *People v. Cohen*, 205 N.Y.S. 2d 481 (1960) at page 487.

It is submitted that the trial court properly refused to permit introduction of evidence of other publications which were not similar or comparable to the "girlie" magazines on trial. Petitioner was permitted to give evidence that magazines of the same type as "Spree" and "High Heels" had been widely sold in the area without objection for a number of years.

CONCLUSION

Certiorari should be denied in this case since the two publications in question are obscene, the Kentucky obscenity statute is constitutional, there was ample evidence to prove the element of scienter and petitioner was not denied the right to introduce evidence of the sale of comparable material.

Respectfully submitted,

ROBERT MATTHEWS
ATTORNEY GENERAL

BY

JOHN B. BROWNING
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

October Term, 19[illegible]

No. [illegible]

WILLIAM L. ADAMS,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

BRIEF FOR THE PETITIONER.

Opinions Below.

The case was initially tried before a trial commissioner and jury in the Quarterly Court of McCracken County, Commonwealth of Kentucky. No opinion was delivered by said court [R. 2-3].

On appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 3-4], the case was tried *de novo* before a judge and jury. No opinion was delivered by said court [R. 5].

The *per curiam* opinion of the Court of Appeals of Kentucky, Chief Justice Moremen dissenting, overruling petitioner's motion for an appeal [R. 121-122], is reported in 386 S.W. 2d 270.

No opinion was delivered in overruling petitioner's petition for rehearing [R. 129].

Jurisdiction.

The judgment of conviction of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, was entered on February 28, 1964 [R. 94-95]. Petitioner's motion for an appeal from said judgment of conviction was denied in a *per curiam* opinion by the Court of Appeals of Kentucky on January 22, 1965, Chief Justice Moremen dissenting, without opinion [R. 121-122]. Petitioner's due and timely petition for rehearing [R. 123-127] was overruled by the Court of Appeals of Kentucky on March 19, 1965 [R. 129; 386 S.W. 2d 270]. On June 8, 1965, by order of Mr. Justice Stewart, the time within which to file a petition for writ of certiorari was extended to August 16, 1965 [R. 129]. The petition was filed on August 13, 1965 and was granted on April 25, 1966, limited to Question 2 presented by the petition [R. 130], as set forth hereinafter.[1]

Question Presented.

Whether Section 436.100 of Kentucky Revised Statutes, on its face and as construed and applied, abridges freedoms of speech and press and arbitrarily deprives persons, including petitioner, of liberty without due process of law contrary to the provisions of the First, Fifth and Sixth Amendments as subsumed into the due process provisions of the Fourteenth Amendment to the Constitution, because:

(a) the statute arbitrarily and capriciously provides that the sale of any publication found to be

[1]Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart were of the opinion that certiorari should be granted on all the questions presented by the petition [R. 131].

obscene "shall be prima facie evidence" that the seller had "knowledge of the obscene character" of the publication;

(b) the court below arbitrarily refused to instruct the jury that if the jury found that the petitioner had a good faith belief that the publications involved were not obscene, then petitioner was entitled to an acquittal; and

(c) the court below arbitrarily excluded from consideration by the jury substantial evidence, both oral and documentary, showing that petitioner had no knowledge of the contents or of the alleged obscenity of the publications involved in the prosecution herein upon which the judgment of conviction against petitioner was rendered.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Kentucky Revised Statutes, Section 436.100, subdivisions 1, 2 and 4, are annexed hereto as Appendix A.

Statement of the Case.

(a) By complaint, sworn to by Mrs. Katherine Wathen and filed in the Quarterly Court of McCracken County, Commonwealth of Kentucky on October 11, 1963 [R. 1-2], petitioner was charged with selling, offering to sell, having in possession, with intent to sell and offer to sell, two magazines, to wit: Volume 1, No. 38 of a publication known as "Spree", and Volume 2, No. 6 of a publication known as "High Heels", it being alleged by the affiant Wathen that both of said publications were "obscene" and contained "obscene pic-

tures and writing or printed material of an indecent character". The verified complaint alleged that petitioner had knowledge of the "contents or character" of the two magazines [R. 1]. The case came on for trial before a Trial Commissioner and a jury of six in the Quarterly Court of McCracken County, Commonwealth of Kentucky. The jury found petitioner guilty as charged, and fixed the punishment at a fine of $100.00 [R. 3]. Petitioner prosecuted an appeal to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky [R. 3-4], and the case thereupon came on for trial *de novo* before the Honorable C. Warren Eaton, a Judge of the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky, and a jury, on February 27 and 28, 1964 [R. 5].

(b) The petitioner is in the wholesale news distribution business, with agencies in Shelbyville, Jackson and Nashville, Tennessee; Carbondale, Illinois, and Paducah, Kentucky [R. 27]. For many years, the petitioner has also owned and operated a large retail book store and newsstand known as Readmore, located in Paducah, Kentucky [R. 28], where hard cover books from all major publishers are sold, including technical works, religious treatises and children's books [R. 28-29]. Petitioner is a member of the American Book Sellers Association and Christian Book Sellers Association [R. 29]. Readmore also sells newspapers, paperback books and magazines [R. 30]. There are about 11,000 titles handled at Readmore each month, to wit, about

> "three thousand titles, approximately, on sale, magazines, all time, and approximately four thousand titles of hard books, and approximately four thousand titles of the paper back books, and we have the newspapers in addition" [R. 30].

The case against petitioner was as follows: On the 28th day of September, 1963, Katherine Wathen, a resident of Paducah, went into Readmore, and purchased from a saleslady in the store, two magazines. For each of the periodicals—"High Heels", vol. 2, No. 6 [Comm. Ex. 1, R. 7] and "Spree", No. 38 [Comm. Ex. 2, R. 7]—the witness paid $1.00 plus tax [R. 7]. Prior to the purchase on September 28, 1963, Mrs. Wathen called Mrs. Patsy McWaters and told her that she, Mrs. Wathen, was going to Readmore "to buy magazines" and that she would like Mrs. McWaters to be present when the purchase was made, "so she could be a witness" in court [R. 16]. Thus, Mrs. McWaters was present at the time of the purchase of the two magazines [R. 9]. The magazines were stapled "so that you couldn't thumb through them" [R. 8]. After the purchase of the publications, Mrs. Wathen took the two magazines home, read "practically all" of the contents, and then brought them to the courthouse where "the summons was issued" [R. 10].

Patsy McWaters [R. 19] testified that she went to Readmore at Mrs. Wathen's telephonic request [R. 19]. Mrs. McWaters witnessed the purchase of the two magazines from the sales clerk [R. 19].

Reverend Herbert Simpson [R. 21], a minister residing in Paducah [R. 21] and a member of the Citizens for Decent Literature [R. 24], testified that petitioner, in May of 1963, met with a ministers committee "on moral and social welfare" at the invitation of the ministers [R. 21], where they discussed the same "class" of magazines as the publications involved in the case herein [R. 23]. The group of ministers was interested in what "rules or standards" petitioner was main-

taining in the store [R. 24]. Petitioner indicated, according to the witness, that he stapled "this type of magazine" together so that they could not "be thumbed through by either teenagers or adults" [R. 24], and the ministers "appreciated this knowledge coming to us" [R. 24]. Petitioner asked the members of the group to let him know about any magazine which they found objectionable and he would look at it and give it his attention, but the organization never furnished him with the name of any such magazine [R. 25-26]. At the meeting with petitioner, the ministers' organization did not specifically name any magazine [R. 24].

The Commonwealth rested its case [R. 26].

The petitioner testified that it was his policy at Readmore to cooperate with any group or even individual that came to him to express a complaint [R. 32]. The volume of books and periodicals handled monthly at Readmore was extremely large [R. 30]. Petitioner did not even know that the two magazines herein involved were on the stand, and the first time he learned about them was when he received the summons based on Mrs. Wathen's complaint [R. 38].

Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, and that he had written to his publishers to this effect [R. 31, 33-34; Deft. Ex. 1 for ident.]. Petitioner offered to prove that a wide variety of comparable magazines were sold by his distribution agencies throughout the numerous communities and areas serviced by said agencies, none of which magazines had ever been barred or restricted by any governmental authority or community in the areas where the magazines were sold [R. 35-37]. All these efforts by

petitioner to prove lack of unlawful knowledge or intent were rejected by the trial court [R. 30-32, 33-34, 35-37].

Curelia Staudt [R. 45], on behalf of petitioner, stated that she had been employed at Readmore as a clerk for some five years [R. 45]. The magazines were kept behind the register with instructions not to sell them to anyone under twenty-one years of age [R. 46]. The magazines were not stapled [R. 46]. At one time they had been, to keep people from standing and leafing through them without buying the periodicals [R. 47]. The petitioner came in about once a week [R. 48].

Wade Sherrill [R. 48], on behalf of petitioner, testified that he was employed as receiving clerk and general warehouse manager for petitioner, doing business as the Basin News Company, the wholesale distributor for the Kentucky area as well as Missouri, Tennessee and parts of Illinois [R. 49]. An attempt was made to prove through the witness that he was under instructions as a matter of policy not to distribute magazines which had no second-class mailing permits, but objections to such testimony were sustained [R. 49]. The witness was also asked whether it was possible to check all the publications as to contents, but objections to this line of questions were also sustained [R. 50].

The petitioner called Dr. C. S. Lowry [R. 51], holder of a Bachelor of Arts degree and a Master of Arts degree from Harvard University, and a Ph. D. degree from the University of Kentucky [R. 51]. Dr. Lowry has been with Murray State College at Murray, Kentucky for almost forty years, and is presently head of the Department of Social Science [R. 51].

Dr. Lowry, at the request of counsel, had examined the two magazines here involved [R. 54]. The witness stated that he was aware of the extent to which magazines of this type sold in the various areas in the community and in other States [R. 55]. In the opinion of the witness, the publications did not exceed customary limits of candor in the community, nor "go as far as some which are generally accepted" [R. 56]. Dr. Lowry was of the opinion that the magazines did not create a shameful or morbid interest in sex or nudity in the average person who might examine them [R. 56]. The witness had read the magazines from cover to cover [R. 57]. None of the textual material, in the opinion of the witness, was obscene, nor did the description of sex in the magazines exceed the description of sex in books and publications generally accepted [R. 57].

The petitioner offered through the witness to put into evidence books which had been sold and accepted in Kentucky, Tennessee and the entire geographical area [Deft. Exs. 4-9 for ident.; R. 60-61][2] but, upon objection by the Commonwealth the offer was rejected [R. 61].

Petitioner called James Apple, an attorney-at-law [R. 61], as a witness in his behalf. Petitioner offered to prove through the said witness that the publication involved in the case of *Sunshine Book Co. v. Summerfield* was "more revealing of the body than either of the two publications in question here" [R. 62; Deft. Ex.

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[2]The books offered into evidence were *Tropic of Capricorn* by Henry Miller [Deft. Ex. 4]; *Carpetbaggers* by Harold Robbins [Deft. Ex. 5]; *Another Country* by James Baldwin [Deft. Ex. 6]; *Lady Chatterley's Lover* by D. H. Lawrence [Deft. Ex. 8]; and *One Hundred Dollar Misunderstanding* by Robert Gover [Deft. Ex. 9].

10 for ident.]. An objection to this offer of proof was sustained by the trial court [R. 62].

The petitioner offered as a witness in his behalf C. L. Werner, who was an investigator employed by counsel for petitioner [R. 63]. The petitioner offered to prove that the witness had obtained certain books of art from the Carnegie Public Library in Paducah, books of art which were available to the general public [R. 63-64]. The witness had made copies of pictures out of these various art publications and these pictures were offered into evidence as defendants Exhibits 11 through 19 [R. 64-66]. An objection to the offer of this testimony and all of the exhibits was sustained by the trial court [R. 66].

In rebuttal, the Commonwealth called Frederick G. Schlafer [R. 67], a Pastor of the Baptist Tabernacle, who testified that he had been a minister since 1938 [R. 68]; that "within the last 24 hours" he had looked at the two magazines and that in his opinion the magazines would appeal to the longing for something lewd or lecherous in the average person. [R.69].

There were requests by petitioner for instructions to the jury which were, in most cases, refused [R. 95-109]. Among the instructions requested by petitioner which were refused were the following:

> "If you do not find beyond a reasonable doubt that the defendant kept for sale or sold the magazines mentioned in the complaint, knowing the contents of the magazines and knowing them to be obscene, you should find the defendant not guilty." [Deft. Inst. No. 6; R. 97].
>
> "If you do not find beyond a reasonable doubt that at the time of the keeping for sale or sale of

the said magazines named in the complaint, the defendant, with knowledge of the nature and obscene character of the magazines, had the specific intent to deprave or corrupt the average person who might read them by inciting lascivious thoughts or arousing lustful desires, you must find the defendant not guilty." [Deft. Inst. No. 8; R. 97].

"If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must acquit the defendant even if you personally believe that the magazines are obscene." [Deft. Inst. No. 19; R. 100-101].

"In this case the commonwealth must prove beyond a reasonable doubt that the defendant had a specific intent to violate the law. You may not infer the specific intent merely on the basis of suspicion, conjecture or surmise, and if you upon all of the evidence you are not satisfied beyond a reasonable doubt that the defendant had such a specific intent you should find the defendant not guilty." [Deft. Inst. No. 20; R. 101].

"Unless and until outweighed by evidence to the contrary, the law presumes that a person is innocent of crime or wrong; that private transactions have been fair and legal; that the ordinary course of business have been followed, and that the law has been obeyed." [Deft. Inst. No. 21; R. 101].

"The state of mind of the defendant can only be established by his own acts and declarations, and cannot be imputed to him by the acts and declarations of others." [Deft. Inst. No. 22; R. 101].

"In every crime there must exist a union or joint operation of act and intent. The burden is

always upon the prosecution to prove both act and intent beyond a reasonable doubt." [Deft. Inst. No. 23; R. 101].

The trial court instructed the jury that if the jury believed from the evidence, beyond a reasonable doubt, that petitioner, as the owner of Readmore, knowingly had for sale, or in his possession with the intent and purpose that the same be sold the magazines referred to in the evidence; and that said magazines were sold by an employee of petitioner, and that said employee had been authorized by petitioner to sell said magazines and had assented to the sale of them; and that the petitioner had knowledge of the contents and character of the said magazines; and that the jury believed, beyond a reasonable doubt, that either of said magazines were obscene and of an indecent character, the petitioner could be found guilty [R. 109]. The jury returned a verdict of guilty and fixed the punishment at a fine of $250.00 [R. 94].

Summary of Argument.

It has been settled by decisions of this Court that the standards and criteria for judging the obscenity of a writing are governed by the demands of the Constitution. Obscenity is not immune from constitutional limitations; it must be measured by standards that satisfy the First Amendment. The definition of "obscenity" includes, at the very least, the following elements: (1) the material must go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient

interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.

In *Smith v. California,* 361 U.S. 147 this Court held that proof of scienter is constitutionally required in any obscenity prosecution. It was held that without a requirement of proof of scienter obscenity prosecutions would tend to restrict the exercise of freedoms of speech and press because a self-censorship would be compelled with an ultimate denial of the community's access to constitutionally protected material. In *Smith v. California,* this Court also observed that elimination of the requirement of scienter would render an obscenity statute unconstitutionally vague and thus violate procedural and substantive provisions of the Bill of Rights,

The decision of the Court in *Smith v. California,* therefore, as well as a series of recent decisions by the Court in other free speech and press areas, support the view that the prosecution in any obscenity action is required to plead and prove that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material with the specific intent to appeal to a prurient interest. The burden of persuasion to prove the essential elements of obscenity, guilty knowledge and unlawful specific intent rests on the prosecution as a constitutional requirement.

If the hazard of self-censorship of constitutionally protected material is to be avoided, and if the ambiguities inherent in the definition of "obscenity" are to be avoided, it is clear that mere proof of knowledge

of the contents of a writing dealing with sex is not the standard for judging scienter or unlawful specific intent. A standard which merely equates knowledge of contents with guilty knowledge and unlawful intent imposes indirectly the same absolute criminal liability expressly condemned by this Court in *Smith v. California*. Such equation amounts to no more than an arbitrary and irrational presumption of guilt which undermines all safeguards required in prosecutions involving speech and press.

The decision of this Court in *Mishkin v. New York*, 383 U.S. 502, would appear to reject mere proof of knowledge of contents as a constitutional standard for judging guilty knowledge and unlawful intent. The decision of the Court in *Rosen v. United States*, rendered in 1896, should not govern determination here. *Rosen* was decided without consideration of the constitutional implications involved in the case. Moreover, the decision was based on the *Hicklin* doctrine rejected by this Court as an impermissible standard under the Constitution. Furthermore, when *Rosen* was decided, this Court had not yet formulated the complex and strict standards for judging obscenity in the light of free speech and press requirements.

Nor should the stringent requirements of scienter in obscenity prosecutions demanded by the Constitution be undermined by claims of "difficulty of proof". This argument of convenience was rejected by this Court in *Smith v. California*, and a number of States have, by express statutory provision or judicial construction, held that pleading and proof of knowledge of the obscenity of the material involved rest upon the prosecution.

The standards and criteria for determining the quality of the proof essential to support findings of scienter and mens rea in the light of the constitutional demands are a separate question. In reviewing the evidence in a free speech or free press case in order to determine whether or not a judgment limiting freedoms of speech and press can find constitutional support in the record, this Court has constantly observed that the standards are strict for assessing the adequacy of proof needed to make out a case of "criminal speech". Proof beyond a reasonable doubt in such cases means proof which is clear, unequivocal and convincing, and which leaves no troubling doubt. The protection of speech and press which are not obscene necessitates, among other things, clear proof of knowledge by the accused that the material involved is obscene and that in the dissemination of such material the accussed had a specific guilty purpose.

The case herein raises two significant questions in the obscenity area. The Kentucky statute was construed and applied below to this petitioner so as to deny petitioner the right to testify and show, by evidence, that he in good faith neither knew the contents nor the alleged obscene character of the writing involved. Moreover, the Kentucky statute also relieves the prosecution of its burden of proof of unlawful knowledge and intent by providing that the dissemination of a writing found to be obscene shall be *prima facie* evidence that the disseminator had knowledge of the obscene character of the material. In both respects, the statute, as construed and applied, deprives petitioner of liberty without due process of law and arbitrarily abridges the exercise of freedoms of speech and press contrary to

the provisions of the First and Fourteenth Amendments.

Petitioner requested the trial court to instruct the jury that if petitioner had a good faith belief that the magazines in question were not obscene, then the jury should acquit the petitioner even if it found the publications to be obscene. This instruction was refused, as were all other instructions requested by petitioner which emphasized that the prosecution was bound to prove knowledge of the obscenity of the material and specific unlawful intent, and that the burden of persuasion was upon the prosecution.

At common law, an honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. Numerous decisions by this Court and by state courts recognize this pervasive principle. Moreover, it should be noted that the question of the right to have the jury pass on the issue of the good faith belief of an accused in an obscenity prosecution implicates the more basic issues of freedoms of speech and press under the Constitution. The constitutional principles which led this Court to impose the scienter requirement in *Smith v. California* necessitate the acceptance of honest ignorance of the obscene nature of a writing as a constitutionally required defense. Subsequent decisions of this Court in other First Amendment areas as well as critical comments of noted commentators in this area support the view that honest belief that a book is not obscene is a constitutionally required defense.

Petitioner was not only deprived of procedural and substantive due process by the failure of the trial court

to instruct as requested, but he was also denied any opportunity to prove, by oral or documentary evidence, that he lacked knowledge of the contents or the alleged obscenity of the two publications involved. On this record, therefore, it must be assumed that petitioner had no knowledge of the contents or alleged obscenity of the material. The statute, as thus construed and applied by the trial court, deprives an innocent person of the right to defend himself against the accusation made by the State. The jury was permitted to conclusively presume guilt and licensed to make its own subjective determination on the issue of scienter.

Under the Kentucky statute, the mere sale of a magazine or other writing is, on its face, evidence that the vendor had knowledge of the obscene character of the magazine if such magazine is found obscene. There was no adequate proof in the record here of guilty knowledge or unlawful intent. Yet, the statute authorized the trial court to submit the issues of scienter and mens rea to the jury. Such statutory proeedures for judging guilty knowledge and unlawful intent impose onerous burdens upon an accused and lead to the same self-censorship and resultant statutory vagueness condemned by this Court in *Smith v. California* and subsequent decisions.

An inference of guilty knowledge and unlawful intent from the mere sale of a writing found by a factfinder to be obscene is both irrational and unreasonable and opens the door capriciously for the conviction of innocent persons. Such an arbitrary prosecution deprives an accused of a meaningful trial and results in the abridgment of free speech and press and due process safeguards guaranteed by the Constitution.

ARGUMENT.

I.

The Standards and Criteria for Judging Issues of Guilty Knowledge and Unlawful Purpose in Obscenity Prosecutions Must Be Measured by the Requirements of the Free Speech and Press Provisions of the First and Fourteenth Amendments to the United States Constitution.

(a) This Court has stated when "the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society". *Speiser v. Randall,* 357 U.S. 513, 521. In *Smith v. California,* 361 U.S. 147, it was stated: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power" (361 U.S. at 155). "It is . . . vital", stated this Court, "that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." *Roth v. United States,* 354 U.S. 476, 488.

This discussion commences, therefore, with the recognition that we deal here with aspects of freedoms of speech and press, whose values are absolutely essential to the existence of a self-governing society. A recognition of this fundamental truth appears in the decisions of this Court. It follows from this that the standards and criteria for judging the scope of any limitation upon the freedoms of speech and press se-

cured by the First Amendment must be governed by the demands of the Constitution, which give the First Amendment liberties "a sanctity and sanction not permitting dubious intrusions". *Thomas v. Collins,* 323 U.S. 516, 530. It is not the standards of the criminal law but those of the First Amendment which determine the Government's power to suppress or punish the circulation of books and other communications. "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 269.[8]

(b) In *Roth v. United States,* 354 U.S. 476, this Court promulgated, for the first time, a definition of obscenity, at the same time rejecting the *Hicklin* standard "as unconstitutionally restrictive of the freedoms of speech and press" (354 U.S. at 489). It was held that the standards for judging obscenity, as promulgated by the Court, were sufficiently limited to withstand the charge of constitutional infirmity, both as a matter of substantive and procedural due process. The

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[8]See, *Speiser v. Randall,* 357 U.S. 513, 520-529; *Smith v. California,* 361 U.S. 147, 152-154; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717, 729-733; *Bantam Books, Inc. v. Sullivan,* 372 U.S. 65-66; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205, 210-213; *Freedman v. Maryland,* 380 U.S. 51, 57-59. See also, *Rosenblatt v. Baer,* 383 U.S. 75, 83-84; *Elfbrandt v. Russell,* 384 U.S. 11, 15-19; *Ashton v. Kentucky,* 384 U.S. 195, 198-201; *Henry v. Collins,* 380 U.S. 356; *Lamont v. Postmaster General,* 381 U.S. 301, 308-310; *Garrison v. Louisiana,* 379 U.S. 64, 73-75; *Stanford v. Texas,* 379 U.S. 476, 481-486; *Griswold v. Connecticut,* 381 U.S. 479, 482-486.

decisions which followed *Roth* continually reiterated that sex and obscenity were not synonymous, and that the standards for judging obscenity as enunciated by the Court were strict, to be applied with constant regard for the broad protection afforded the freedoms of speech and press provisions of the First and Fourteenth Amendments. *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684; *Jacobellis v. Ohio,* 378 U.S. 184.

Under the definition of obscenity as elaborated in the decisions of this Court, the following essential ingredients are therefore required to be established: (1) the material must go substantially beyond the customary limits of candor, in the Nation as a whole, in the description or representation of matters pertaining to sex; nudity or excretion; (2) the dominant theme of the material, taken as a whole, must appeal to prurient interest; (3) the material must be utterly without social importance; and (4) the constitutional status of the material cannot be made to turn on a weighing of the social importance of the material against its alleged prurient appeal.[4]

The Court has therefore decided that actions under obscenity statutes, federal or state, cannot be maintained under the Constitution unless, at the very least,

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[4]In *Ginzburg v. United States,* 383 U.S. 463; and *Mishkin v. New York,* 383 U.S. 502, this Court held that "in close cases" evidence of defendant's "pandering" in the production, sale and publicity with respect to the material involved might be probative with respect to the nature of the material in question and, thus, satisfy the *Roth* test (383 U.S. at 474). The addition of the element of "pandering" would appear to make the legal definition of the word "obscenity" more obscure. The issue of "pandering" is not involved in the case herein but the new element imported into the definition of "obscenity" affects the questions of knowledge and intent involved in the proceedings herein.

it is "established" by the State that all of the aforesaid essential ingredients "coalesce". *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, 418.

(c) That questions of guilty knowledge and unlawful purpose are significantly presented in any obscenity prosecution was first noted by the Court in *Roth v. United States,* 354 U.S. 476, 491-492. In *Roth,* it was conceded that the standards promulgated by the Court for judging obscenity were not precise, but it was held that nevertheless such enunciated standards provided reasonably ascertainable standards of guilt because both the federal and state statutes there involved, on their face and as construed and applied, included as an element of the offense proof of guilty knowledge and intent. See the decisions cited by Mr. Justice Brennan in *Roth v. United States,* 354 U.S. at 492, and the concurring opinion of Chief Justice Warren, 354 U.S. at 494-496. However, the constitutional significance of the requirement of *scienter* was not fully explored in all its facets until the determination of this Court in *Smith v. California,* 361 U.S. 147.

In striking down the California ordinance which imposed strict or absolute criminal responsibility on those engaged in the publication and dissemination of books and other forms of the printed word, this Court elaborated the principles and postulates which governed its decision that the action of the State violated the free speech and press and due process provisions of both the First and Fourteenth Amendments.

It was emphasized that the elimination of the *scienter* requirement may tend to work a substantial restriction on the freedoms of speech and press; that any procedural device adopted by a State which tends to cause

even a self-imposed restriction of free expression must be stricken down; that a statute which is patently capable of many unconstitutional applications threatens those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution; that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; and that the indiscriminate classification of innocent and guiltless behavior with knowing activity and unlawful purpose were clearly violative of the protective provisions of the Constitution. *Smith v. California,* 361 U.S. at 150-152.

Applying the aforesaid principles, this Court held that the California ordinance, though aimed at obscene matter, had such a tendency to inhibit constitutionally protected expression that it could not stand under the Constitution. "The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded" (361 U.S. at 154).

In view of the ruling in *Smith v. California,* and the constitutional principles implicated therein, it appears clear that the prosecution, in any obscenity action, is required to plead and prove that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material with the specific intent to appeal to a prurient interest. It is of course axiomatic that the burden is always on the prosecution to plead and prove every essential ingredient of the offense. *Gojack v. United States,* 86 S. Ct. 1689, 1693. The accused is not to be con-

victed unless the prosecution "shoulder the entire load". *Tehan v. Shott,* 382 U.S. 406, 415; *Miranda v. Arizona,* 86 S. Ct. 1602, 1620; *Schmerber v. California,* 86 S. Ct. 1826, 1831. See also, *United States v. Klaw, et al.,* 350 F. 2d 155 (2 Cir. 1965).

The requirement that the prosecution prove that the accused knows that the material substantially exceeds contemporary community standards; appeals to prurient interest; and is utterly without redeeming social importance, is supported not only by decisions of this Court in obscenity actions but in related areas of speech and press. So far as obscenity actions are concerned, not only *Smith v. California* but the decision of the Court in *Freedman v. Maryland,* 380 U.S. 51, establish the constitutional requirements. Thus, in *Freedman,* it was stated that "the burden of proving that the film is unprotected expression must rest on the censor" (380 U.S. at 58). This Court further stated in *Freedman,* quoting from *Speiser v. Randall,* 357 U.S. 513, 526: "Where the transcendent value of speech is involved, due process certainly requires . . . that the State bear the burden of persuasion to show that the appellants engaged in criminal speech."

In *Elfbrandt v. Russell,* 384 U.S. 11, there was involved a state loyalty oath which penalized a knowing member of an organization which had as one of its purposes the violent overthrow of government. The oath did not exclude a member who joined the organization without the specific intent to further an alleged illegal action of the group. This Court held that such loyalty oath requirement violated the First Amendment protection of freedom of association because the oath, as construed, created the "hazard of being prosecuted for

knowing but guiltless behavior" (384 U.S. at 16). It was held that the oath, without a restriction to those who join with "specific intent" to further illegal action, imposed a conclusive presumption that the member shares the unlawful aims of the organization. The oath, as construed and applied, was held to violate both the procedural and substantive due process safeguards of the Fourteenth Amendment.

In similar fashion, it is submitted, an obscenity statute which, on its face or as construed and applied, purports to punish an individual for violation of the law, without proof that such individual knew that the material was obscene and specifically intended to appeal to a prurient interest, does violence to the free speech and press provisions of the Constitution.

In *New York Times Co., et al. v. Sullivan,* 376 U.S. 254., this Court stated that "a defense for an erroneous statement honestly made is no less essential here than was the requirement of proof of guilty knowledge which in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we held indispensable to a valid conviction of a bookseller for possessing obscene writings for sale" (376 U.S. at 278). In holding that a public official, suing to recover damages for a defamatory falsehood, must assume the burden of proving that the statement made with respect to the official was made with knowledge of the falsity of the statement, the Court held that any other rule would deter public criticism and be inconsistent with the First and Fourteenth Amendments. See also, *Henry v. Collins,* 380 U.S. 356. And in *Garrison v. Louisiana,* 379 U.S. 64, the power of a State to impose criminal sanctions for criticism of the official conduct of public officials was similarly

limited. "[O]nly those false statements made with the high degree of awareness of their probable falsehood demanded by New York Times may be the subject of either civil or criminal sanctions" (379 U.S. at 74).

If the Constitution protects all discussion of political affairs, and punishes only "the use of calculated falsehood" (379 U.S. at 75), then, it is submitted for similar reasons, all material dealing with sex is entitled to constitutional protection, and only those may be punished who, with knowledge of its obscenity and with specific unlawful intent, disseminate obscene material as defined by this Court.

In *Dennis v. United States*, 341 U.S. 494, the statute involved prohibited the wilful advocacy of overthrow of Government by force of violence and the organization of any group advocating overthrow of Government. This Court stated: "We hold that the statute requires as an essential element of the crime proof of the intent of those who are charged with its violation to overthrow the Government by force and violence." (341 U.S. at 499.) Referring to prior decisions of the Court, it was held that the language of criminal statutes must be so construed as to avoid manifest injustice and infringement of constitutional safeguards. See, *Screws v. United States*, 325 U.S. 91; *Spies v. United States*, 317 U.S. 492; *Aptheker v. Secretary of State*, 378 U.S. 500, 510-511.

In the light of all the aforesaid, it would therefore appear essential that the standards for judging *scienter* and unlawful intent in any obscenity prosecution include, as an initial requisite, pleading and proof of knowledge on the part of the accused that the material involved is obscene, and the publication, distribution or sale by such accused with specific intent to appeal to the prurient interest.

In *Mishkin v. New York*, 383 U.S. 502, 511, this Court stated: "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity." In approving the authoritative interpretation placed upon the New York obscenity statute by the highest court of the State with respect to the "stringent scienter requirement" and the "vital element of scienter" (383 U.S. 502, 507, fn. 5, 510), this Court specifically noted that a parenthetical reference in the Court of Appeals' opinion to "knowledge of the contents of the books" was not to be read as a "modification of this definition of scienter". (383 U.S. at 510, fn. 9).

It is vital, it is submitted, in the formulation of the standards for judging issues of scienter and unlawful intent that the important distinction between knowledge of contents and knowledge of obscenity be made. The question at this point of the discussion is not the quantum of proof necessary to support an obscenity conviction, but rather the standards by which courts and juries are to be guided in making their determination with respect to the proof presented. Such standards must meet the scrupulous demands of the Bill of Rights.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of proof of knowledge of contents is to attempt indirectly to impose the absolute criminal liability which was condemned by this Court in *Smith v. California*. Sex is not synonymous with obscenity, and knowledge of the contents of a writing dealing with sex is not in itself the equivalent of knowledge of the alleged obscenity of the writing. Mere proof that a publisher or distributor knows the

contents of *Lady Chatterley's Lover* or *Tropic of Cancer* in no way establishes, it is submitted, that such publisher or distributor knows that the books are obscene. See, *Grove Press, Inc. v. Gerstein*, 378 U.S. 577; *Grove Press, Inc. v. Christenberry*, 276 F. 2d 433 (2 Cir. 1960), affirming 175 F. Supp. 488 (D.C. N.Y. 1959). See also, *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488-491; *Tralins v. Gerstein*, 378 U.S. 576; *Jacobellis v. Ohio*, 378 U.S. 184, 195-196; *A Quantity of Copies of Books, et al. v. Kansas*, 378 U.S. 205; the concurring opinions of Justice Stewart in *Jacobellis* and *A Quantity of Copies of Books*, 378 U.S. at 197, 214-215; the dissenting opinion of Justice Stewart in *Ginzburg v. United States*, 383 U.S. 463, 497-501; and the opinions of Justices Black, Douglas and Stewart that certiorari should be granted on all the questions presented by the Petition herein, and the Petition in the companion case of *Redrup v. New York*, October Term 1966, No. 3. 86 S. Ct. 1362-1363.

To equate knowledge of contents with knowledge of obscenity is, in effect, to authorize the punishment of guiltless behavior. *Elfbrandt v. Russell*, 384 U.S. 11. Moreover, such an equation amounts to no more than the creation of an arbitrary and irrational presumption of guilt which undermines all procedural safeguards required in prosecutions involving speech and press. *Baily v. Alabama*, 219 U.S. 219; *Tot v. United States*, 319 U.S. 463; *Speiser v. Randall*, 357 U.S. 513; *United States v. Romano*, 382 U.S. 136; *Morissette v. United States*, 342 U.S. 246. Further, such arbitrary standard would encourage the self-censorship and private suppression of constitutionally protected material which the Constitution is intended to prevent. A publisher, or dis-

tributor, or bookseller, who faces prosecution and conviction for the dissemination of a book dealing with sex merely because he knows its contents, will clearly steer clear of such book. *Smith v. California,* 361 U.S. 147; *Marcus v. Search Warrants of Property etc.,* 367 U.S. 717; *A Quantity of Copies of Books, et al. v. Kansas,* 378 U.S. 205. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Elfbrandt v. Russell,* 384 U.S. 11.[5]

In short, it is submitted, knowledge of contents does not constitute the definition of "scienter" in obscenity prosecutions, but is only an expression of its minimum requirements. Without clear proof of knowledge of contents, there can be no finding of proof of knowledge of the alleged obscenity of the contents. But knowledge of obscenity and unlawful intent must be the constitutional standard.

The decision of the Court in *Rosen v. United States,* 161 U.S. 29, rendered in 1896, should not, it is respectfully submitted, govern determination here. In the first place, the decision in *Rosen* was rendered without discussion of the constitutional implications involved in the case, especially the relation of issues of scienter and intent in obscenity prosecutions to the free speech and press requirements of the Constitution. Secondly, the case was decided under the *Hicklin* doctrine, which this Court has held to be an impermissible standard under the Constitution. If a single page in a publication dealing with sex is to be tested by "whether the tendency of the matter is to deprave and corrupt the

[5] "[T]he ultimate question is not knowledge of the contents but knowledge of the obscenity of the contents." Note, 34 *George Washington Law Review* 552, 555 (March 1966).

morals of those whose minds are open to such influence, and into whose hands a publication of this sort may fall", or by whether it would "suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced" (161 U.S. at 43), then the disseminator of any such book might always face the danger of an arbitrary charge of guilty knowledge. *Cf., Roth v. United States,* 354 U.S. 476, 489; *Smith v. California,* 361 U.S. 147; *Mishkin v. New York;* 383 U.S. 502, 510-511.

Moreover, at the time when *Rosen* was decided, this Court had not formulated the standards for judging obscenity in the light of free speech and press requirements. Since the elements of the definition now include "contemporary community standards", "appeal to prurient interest", and "social importance", it is evident, it is submitted, that no publisher, distributor or bookseller at the present time can rationally be required to "take notice" of what in this "enlightened age" is meant by "obscenity" (161 U.S. at 42). "To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do through argument to this Court what it is required by due process to do at the trial, and would be 'to turn the doctrine into a pretext for dispensing with a trial'." *Garner v. Louisiana,* 368 U.S. 157, 173.

Nor should the stringent requirements of scienter in obscenity prosecutions demanded by the Constitution be undermined by claims of "difficulty of proof". Such an argument presupposes that guilty knowledge and unlawful intent actually exist but that proof thereof is peculiarly burdensome. "But if we appraise the actual situation in this respect, without prejudging it, it is impos-

sible to attach any great weight to that argument, it amounts to no more than a bare assertion or a mere guess. It is obviously at odds with what is actually done in countless prosecutions." Hall, *General Principles of Criminal Law* (1960) 349.

Moreover, such argument of convenience has been rejected by this Court. "We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind." *Smith v. California,* 361 U.S. 147, 154. See also, *Dennis v. United States,* 341 U.S. 494, 500; *Morissette v. United States,* 342 U.S. 246, 259; *Tot v. United States,* 319 U.S. 463.[6]

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[6]A number of States have, by express statutory provision or judicial construction, held that proof of knowledge of the obscenity of the material involved is an essential element of the offense. Arizona holds that "knowingly" in its obscenity statute [Ariz.Rev.Stat.Ann. §13-532 (Supp. 1965)] means "with knowledge of the obscene nature of the materials involved". *State v. Locks,* 91 Ariz. 394, 372 P. 2d 724, 726 (1962). See also, *State v. Locks,* 97 Ariz. 148, 397 P. 2d 949, 951 (1965). California defines "knowingly" in its obscenity statute as meaning "knowledge that the matter is obscene" [Cal.Pen.Code §311]. Connecticut holds that "proof of knowledge that the proscribed material is obscene or indecent is requisite to a conviction". *State v. Sul,* 146 Conn. 78, 147 A. 2d 686, 691 (1951). Florida requires pleading and proof by the prosecution of "knowledge of the obscene character" of the material involved. *Cohen v. State,* 125 S. 2d 560 (1960). The Georgia statute [Ga.Code Ann. §26-6301 (Supp. 1965)] requires proof of knowledge of "the obscene nature of such matter". The Idaho obscenity statute [Idaho Code Ann. (1947) Sect. 18-401] punishes the "wilful and lewd" dissemination of obscene material. Illinois requires proof of the "obscene quality" of the material. *People v. Sikora,* 32 Ill. 2d 260, 204 N.E. 2d 768 (1965). The Iowa obscenity statute [Section 725.5, Code of Iowa (1962)] was recently held unconstitutional because it punished conduct "irrespective of whether or not the material dealt with was known by the purveyor to be obscene". *State v. Ramos,* D.C. Iowa, Pottawattamie Co. at Council Bluffs No. 15235 (decided 4/7/66), unreported. Louisiana requires both an intent to appeal to prurient interest

(This footnote is continued on the next page)

(e) Once it is accepted that the Constitution requires proof of knowledge of the alleged obscenity of the materials and the specific intent to appeal to prurient interest in any obscenity prosecution, then the next question presented is, it is submitted, the standards and criteria for determining the quality of the proof essential to support findings of scienter and mens rea in the light of the constitutional demands. On this issue, this Court has constantly admonished that it will review the evidence in a free speech or free press case to determine whether or not a judgment limiting such speech or press can find constitutional support in the evidence presented by the record. In short, constitutional principles may always be undermined if improperly applied in particular cases, and it becomes, therefore, essential that courts and juries receive guidance from this

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[La.Rev.Stat.Ann. §14:106 (West Supp. 1965)] and "guilty knowledge". *State v. Routa*, 241 La. 474 129 S. 2d 743 (1961). Maryland punishes the dissemination of obscene material "knowing it to be obscene". *Yudkin v. State*, 229 Md. 223, 182 A. 2d 798, 800 (1962). The Massachusetts obscenity statute [Mass.Ann.Laws Ch. 272, §28B (Supp. 1965)] expressly requires knowledge of obscenity. See, *Demetropolos v. Commonwealth*, 342 Mass. 658, 175 N.E. 2d 259 (1961). Minnesota has held that the State is required to prove "knowledge of the obscene character" on the part of a bookseller before conviction of violating the statute. *State v. Oman*, 265 Minn. 277, 121 N.W. 2d 616, 619 (1963). Ohio interprets "knowingly" in its statute [Ohio Rev.Code Ann. §2905.34 (Page Supp. 1965)] as meaning "scienter (guilty knowledge)" and "mens rea (guilty purpose)", both of which must be established. *State v. Jacobellis*, 173 Ohio St. 22, 179 N.E. 2d 777 (1962), reversed on other grounds 378 U.S. 184. Oregon, by judicial construction, has included scienter into the governing statute, holding that the language of this Court in *Smith v. California* "hints that the federal constitution may impose a more restrictive standard of scienter than is necessary to convict of offenses where free speech is not involved". *State v. Jackson*, 224 Ore. 337, 356 P. 2d 495, 499 (1960). It is apparent that the requisite constitutional standard of proof of guilty knowledge and unlawful purpose cannot be undermined by arguments of "difficulty of proof".

Court with respect to where the line may be drawn "between speech unconditionally guaranteed and speech which may legitimately be regulated". *Speiser v. Randall,* 357 U.S. 513, 525. See, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254, 284-288; *Napue v. Illinois,* 360 U.S. 264, 271-272; *Jacobellis v. Ohio,* 378 U.S. 184, 189.

In cases involving substantive and procedural rights guaranteed by the provisions of the Bill of Rights, this Court has held that the standards are strict for assessing the adequacy of proof needed to make out a case of "criminal speech". In *New York Times Co., et al. v. Sullivan,* 376, U.S. 254, 285-286, a civil action, the proof lacked the "convincing clarity which the constitutional standard demands" and, hence, was held inadequate to constitutionally sustain a judgment under the proper rule of law. In *Noto v. United States,* 367 U.S. 290, 299, the evidence in the record to support the jury's verdict of illegal advocacy was held lacking "in any adequately substantial degree". In *Hartzel v. United States,* 322 U.S. 680, this Court held that evidence in the record did not support a jury finding "beyond a reasonable doubt" that the accused had the specific intent to cause insubordination in the Armed Forces and to obstruct recruiting of enlistment therein. In *Baumgartner v. United States,* 322 U.S. 665, this Court held that the proof was not sufficiently "clear, unequivocal and convincing" to justify cancellation of a certificate of naturalization. This Court added that the case made out by the Government lacked that "solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen"

(322 U.S. at 670). In *Schneiderman v. United States,* 320 U.S. 118, 125, this Court held that rights of citizenship could not be lost "upon a bare preponderance of evidence which leaves the issue in doubt". See also, *Gonzales v. Landon,* 350 U.S. 920.

In *Wood v. Georgia,* 370 U.S. 375, this Court could find nothing presented in the record to justify a finding of clear and present danger to the administration of justice and therefore reversed a contempt conviction which punished a sheriff for expressions of opinions ordinarily protected by the free speech guarantees of the Constitution. In *Edwards v. South Carolina,* 372 U.S. 229, upon an independent examination of the whole record, this Court held that the accused were convicted upon evidence "which showed no more" than opinions which were "sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection" (372 U.S. at 237). In *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, Justice Harlan, in deciding that the proof was insufficient to justify a holding that the publishers knew that their advertisers were offering obscene matter for sale, observed that the burden of proof on the issue of scienter was not satisfied merely by showing that a defendant did not make a "good faith effort" to ascertain the character of his advertisers' materials (370 U.S. at 493). See also, *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Shuttlesworth v. City of Birmingham,* 382 U.S. 87.

A distillation of the aforesaid cases clearly reveals the necessity of strict proof requirements in free speech and press cases imposed by the provisions of the Constitution. Since proof of scienter and mens rea are neces-

sary and essential to save obscenity statutes from constitutional infirmity, both substantive and procedural, it appears essential that proof of such knowledge of obscenity and unlawful intent be clear, convincing, unequivocal and without doubt in order to protect speech and press which is not obscene. *Cf., United Mine Workers of America v. Gibbs,* 383 U.S. 715, 737.

(f) In the discussion which follows hereinafter in this brief, two other significant principles in this area are examined: the first, whether an accused in an obscenity prosecution may constitutionally be denied the right to testify and show by evidence that he in good faith neither knew the contents nor the alleged obscene character of the writing involved; the second, whether a State may relieve the prosecution of its burden of proof of unlawful knowledge and intent by providing that the dissemination of a writing found to be obscene shall be *prima facie* evidence that the disseminator had knowledge of the obscene character of the material. The discussion of these latter questions is premised on the standards heretofore discussed, to wit, that scienter and mens rea in obscenity prosecutions mean knowledge of the alleged obscenity of the material and specific intent to appeal to the prurient interest; that the State has the burden to plead and prove these elements of the offense beyond a reasonable doubt, or its equivalent, by clear, convincing and unequivocal evidence—these principles being essential in the light of the requirements of the Constitution.

II.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Eliminate a Defense of Good Faith Belief That Publications Are Not Obscene, and to Exclude Evidence, Both Oral and Documentary, Showing That an Accused in an Obscenity Prosecution Has No Knowledge of the Contents or of the Alleged Obscenity of the Publications, Abridges Freedoms of Speech and Press and Arbitrarily Deprives the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

(a) Petitioner requested the trial court to instruct the jury that if "the defendant had a good faith belief that the magazines in question were not obscene", then the jury should acquit the defendant even if it found the publications to be obscene [Deft. Inst. No. 19; R. 100-101]. The Court refused to give such instruction. Thus, under the Kentucky statute, a conviction may be had even if the disseminator of the writing honestly believes that the publication is not obscene. Therefore, as the State construes its obscenity statutes, once the prosecution has proved its case on issues of scienter, there is a conclusive presumption that the accused had the required guilty knowledge and unlawful intent, and the accused may not be absolved even if in fact the accused honestly did not believe that the publications were obscene. In short, an accused, in a prosecution brought under the Kentucky statute, may be convicted for possessing guilty knowledge and unlawful purpose when, admittedly and in fact, he had none.

It is submitted that such construction of the obscenity statute renders the statute constitutionally infirm. It subjects the statute to the same due process infirmities of vagueness which offend both the free speech and press provisions as well as the procedural due process provisions of the Constitution. *Smith v. California,* 361 U.S. 147.[7]

In *Screws v. United States,* 325 U.S. 91, this Court held that the section of the statute there involved, penalizing conduct depriving persons of rights, privileges or immunities secured or protected by the Constitution and laws of the United States, could only constitutionally be upheld if construed to require a specific intent on the part of an accused to deprive a person of a federal right, made definite by decision or other rule of law. This Court stated that otherwise an accused might be condemned as "a criminal though his motive was pure and though his purpose was unrelated to the disregard of any constitutional guarantee" (325 U.S. at 97). In *Morissette v. United States,* 342 U.S. 246, the accused sought to show that he did not intend to steal certain property but thought that the property was abandoned. The trial court held, however, that the accused would not be permitted to show his belief that the property was abandoned, and the court refused to submit to the jury whether the accused acted with innocent intention. In reversing the conviction, this Court stressed the numerous judicial rulings which "have

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[7] "Little is to be gained by punishing the legitimate bookseller who unknowingly offers an obscene publication for sale to the public. The end result of such misguided prosecution can only be a breeding of disrespect for the law and suppression of the free exchange of ideas." Note, 21 Oh.St.L.J. 242, 244 (1960).

sought to protect those who were not blameworthy in mind from conviction of infamous common-law crimes * * * The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries" (342 U.S. at 252, 263).

In *Weiman v. Updegraff,* 344 U.S. 183, 191, it was held: "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power." See also, *American Communications Assn. v. Douds,* 339 U.S. 382, 413; *Elfbrandt v. Russell,* 384 U.S. 11, 16-17. In *Garrison v. Louisiana,* 379 U.S. 64, 73, this Court, in holding the Louisiana criminal libel statute to be constitutionally invalid, stated, among other things, that a speaker should be protected even if he did speak out of hatred if his utterances were "honestly believed". In *United States v. Murdock,* 290 U.S. 389, the accused was indicted for refusal to give certain testimony and supply information as to deductions claimed in his income tax returns. The accused requested the trial court to instruct the jury that if it found that the reasons stated by the accused in his refusal to answer the questions "were given in good faith and based upon his actual belief" then the jury should consider these elements in determining whether or not the refusal to answer questions was wilful (290 U.S. at 393). This Court held that the accused was entitled to the charge he requested "with respect to his good faith and actual belief" (290 U.S. at 396).

The aforesaid decisions are only examples of a general pervasive principle. At common law, an honest and

reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense. *Regina v. Tolson* (1889), 23 Q.B.D. 168. See, *People v. Powell*, 63 N.Y. 88 (1875); *People v. Vogel*, 46 Cal. 2d 798, 299 P. 2d 850 (1956) [bigamy charge—error to deprive defendant of defense of bona fide reasonable belief that he was free to remarry]; *People v. Stuart*, 47 Cal. 2d 167, 302 P. 2d 5 (1956) [fatal prescription by pharmacist—reasonable mistake or unavoidable action may be shown]; *People v. Hernandez*, 61 Cal. 2d 529, 393 P. 2d 673, 39 Cal. Rptr. 361 (1964) [statutory rape—accused may show reasonable belief that prosecutrix had reached age of consent].

Against the background of the aforementioned decisions, it should be noted more importantly that the question of the right to have the jury pass on the issue of the good faith of an accused in an obscenity prosecution implicates free speech and press issues. It is submitted that all the constitutional principles which led the Court to impose the scienter requirement in *Smith v. California*, 361 U.S. 147, necessitate acceptance of honest ignorance of the obscene nature of a writing as a constitutionally required defense. Indeed, a state court has so interpreted the decision of this Court in *Smith v. California*. *State v. Hudson County News Co.*, 35 N.J. 284, 290, 173 A. 2d 20, 23 (1961).

Professors Lockhart and McClure have stated that "we believe the court should rule that the scienter requirement has not been met if . . . the seller honestly believed that the book was not obscene". *Censorship of Obscenity: The Developing Constitutional Standards*,

45 Minn. L. Rev. 5, 107. The authors state (*Ibid.*, at p. 106):

> ". . . The strong public interest in encouraging dissemination of non-obscene literature, which motivated the imposition of the scienter requirement, dictates an affirmative answer. In the case of blatantly hard-core pornography, such a defense would obviously be rejected as untrue. But the character of many books is such that it will be impossible, under evolving constitutional standards, to determine in advance of a judicial ruling whether a book is 'obscene,' even with the best legal advice. To require that a bookseller sell such a book at his peril would constitute a substantial deterrent to the sale of significant literature that is not obscene, for it would result in the very 'self-censorship . . . privately administered' and 'timidity in the face of absolute criminal liability' that the Court sought to avoid by imposing the scienter requirement."[8]

The American Law Institute has expressed the belief that "a possibility of acquittal for honest igno-

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[8]Professors Lockhart and McClure reject the notion that because a defendant is permitted to testify that he was honestly ignorant of the alleged obscenity of the material involved that this would cause difficulty in enforcement. They state that "adjudications that a book is obscene can readily be obtained under statutes authorizing declaratory judgment or book libel proceedings, or under the growing volume of statutes authorizing injunctions against the sale of particular obscene material" (*Ibid.*, at 106-107). By giving due process notice thereafter, to interested parties, the authors indicate that the State's interest in effective control would be protected. But aside from such notice, it is difficult to understand why the mere denial by defendant that he had knowledge of the alleged obscenity of a writing forecloses a prosecutor from proving the contrary. Moreover, recognition of a defense of honest ignorance may be of aid in preventing those extra legal procedures of public officials and private organizations which are encouraged in their activities by uncertainties in the law.

rance should be preserved." A.L.I. *Model Penal Code* (Tent. Draft. No. 6, 1957) 51. The Institute stated that "retention of this *mens rea* defense will help to preserve a proper conservatism in law enforcement effort in this field" (*Ibid.*, at 51). The Institute rejected any "conclusive" presumption of knowledge (*Ibid.*, at 51). See also, Note, The Supreme Court 1959 Term, 74 Harv. L. Rev. 81, 126-128 (1960); 27 F.R.D. 157-158.

A statute which deprives an accused in an obscenity prosecution of good faith belief that the material involved is not obscene would appear to be susceptible of sweeping and improper applications and of thus becoming a deterrent to the exercise of constitutionally protected speech and press. "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech or of the press suffer." *Ashton v. Kentucky,* 384 U.S. 195, 200. See also, *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403; *Dombrowski, et al. v. Pfister,* 380 U.S. 479, 486-487; *Lamont v. Postmaster General,* 381 U.S. 301, 308-310.

Moreover, this Court has stated that the Fourteenth Amendment requires that "regulation by the States of obscenity conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66. Only recently, this Court noted "the ambiguities inherent in the definition of obscenity". *Mishkin v. New York,* 383 U.S. 502, 511. It is clear that publishers, distributors and booksellers are necessarily required to speculate in this area as to whether a book

dealing with sex is obscene under the imprecise standards now existing for the judging of obscenity. To deprive such persons of a defense of honest ignorance can only deter the sale of constitutionally protected books and other related media of communication. Moreover, it is submitted, to deprive an accused in an obscenity prosecution of a defense of good faith belief that the material was not obscene is to deny an accused the right to be meaningfully heard in his own defense. It is a denial of due process "in the primary sense". *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 681; *Saunders v. Shaw,* 244 U.S. 317; *Hovey v. Eliott,* 167 U.S. 409, 417.

(b) The unlawful construction and application of the statute is further exemplified by the rulings of the trial court. Every effort on the part of petitioner to prove a lack of knowledge of the contents or the alleged obscenity of the two publications was thwarted by the trial court. Petitioner was not permitted to prove, either through his own testimony or through the testimony of his employees, that it was impossible to inspect each of the writings sold at Readmore [R. 30-31, 50]. Petitioner offered to prove that he sought only magazines which had second-class permits from the Post Office Department, that he had written to all his publishers to that effect, and that he had instructed his employees not to distribute magazines which had no second-class mailing permits. All of these offers were rejected [R. 30-32, 33-34, 35-37; Deft. Ex. 1 for Ident.]. Furthermore, petitioner's offer to prove that a wide variety of comparable magazines were sold by him without bar or restriction by any governmental authority was also rejected [R. 35-37]. Hence, every effort by petitioner to

prove that he had no knowledge of the alleged obscenity of the publications was frustrated by the trial court.

Since petitioner offered to prove that he was unaware of the contents of the publications or the alleged obscenity of the material, it must be assumed that petitioner had no knowledge of the contents or alleged obscenity of the material involved. *Lambert v. California,* 355 U.S. 225, 227. The result of such action by the trial court was to create the same vagueness and ambiguity in the law which this Court condemned in *Smith v. California,* 361 U.S. 147. The statute, as construed and applied by the trial court, resulted in the deprivation of an opportunity by an innocent person to defend himself against the accusation made by the State and the prosecution thereunder. The jury was permitted to conclusively presume guilt and licensed to make its own subjective determination on the issue of scienter. See, *Bailey v. Alabama,* 219 U.S. 219; *Tot v. United States,* 319 U.S. 463; *Speiser v. Randall,* 357 U.S. 513; *United States v. Romano,* 382 U.S. 136; *Herndon v. Lowry,* 301 U.S 242, 263.

Again, aside from free speech and press considerations, the actions of the trial court deprived petitioner of those procedural due process guarantees which are intended to protect at all times individuals charged with or suspected of crime. "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States,* 318 U.S. 332, 347. See also, *Holden v. Hardy,* 169 U.S. 366, 389-390; *Hovey v. Eliott,* 167 U.S. 409, 417; *Morgan v. United States,* 298 U.S. 468, 480-481.

The criminal charge of unlawful dissemination of an allegedly obscene publication presupposes that the ac-

cused knew the contents of the material and knew that the material was obscene and, with such guilty knowledge, disseminated the material with intent to appeal to prurient interest. Conviction on such a charge, without permitting an accused a defense or the opportunity to prove that he was honestly ignorant of the contents and obscene nature of the material, arbitrarily and capriciously deprives such an accussed of any meaningful trial, and deprives him of all the procedural and substantive safeguards guaranteed to the accused by the protective arms of the Bill of Rights.

III.

The Provision of the Kentucky Statute Which Makes the Dissemination of a Publication Found to Be Obscene to Be Prima Facie Evidence That the Disseminator Had Knowledge of the Obscene Character of the Writing Abridges the Exercise of Freedoms of Speech and Press, and Arbitrarily Deprives Persons of Liberty Without Due Process, Contrary to the Provisions of the First and Fourteenth Amendments.

The state statute [K.R.S. 436.100(4)] provides that the sale of any magazine "found to be obscene, shall be prima facie evidence that the seller . . . who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure". Hence, the mere sale of a magazine or other writing by a bookseller in a retail establishment is, on its face, under the statute, evidence that the vendor had knowledge of the "obscene character" of the magazine if such magazine is found obscene. Without adequate proof in the record of guilty knowledge or unlawful intent, as in the case herein, the statute authorizes a trial court to submit the

issues of scienter and mens rea to a jury, and for such jury to determine questions of obscenity as well as guilty knowledge and unlawful intent.

This Court has emphasized that "where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, . . . provide but shifting sands on which the litigant must maintain his position." *Speiser v. Randall,* 357 U.S. 513, 526. See also, *Freedman v. Maryland,* 380 U.S. 51, 58.

Knowledge of the obscenity of a writing includes such factual elements as knowledge that a writing substantially exceeds contemporary community standards, in the Nation as a whole, in the description or representation of matters pertaining to sex, nudity or excretion; that such writing appeals to prurient interest; and is utterly without social importance. These are complex factors, not easily decided, as the decisions of this Court from *Roth* through *A Book etc. v. Attorney General of Massachusetts,* 383 U.S. 413, make abundantly clear. To place upon an accused the burden of proving the negative in all such respects is both unreasonable and unjust. It can only result in that same self-censorship, with resultant detriment to the community, which this Court noted in *Smith v. California,* 361 U.S. 147. See also, *New York Times Co., et al. v. Sul-*

livan, 376 U.S. 254, 283-284; *Garrison v. Louisiana,* 379 U.S. 64, 73-74; *Henry v. Collins,* 380 U.S. 356. To permit the burden to be placed upon an accused without proof by the prosecution that the accused had guilty knowledge or unlawful intent is to enable convictions to take place without proof of scienter, and despite the protestations of the accused, so long as the factfinder believes that the material involved is obscene.[9]

It is plain that under such procedural standards for judging obscenity, a publisher, distributor or bookseller will refrain from dealing with any book or writing involving sex in order to avoid assuming such onerous and impossible burdens. No accused, it is submitted, can fairly sustain the burden of proving lack of scienter when the mere sale of a writing is *prima facie* evidence of scienter if the trier of the facts believes that the writing is obscene. There is no reason why the State should be permitted to adopt such "a short-cut procedure which must inevitably result in suppressing protected speeck". *Speiser v. Randall,* 357 U.S. 513, 529.

The right to a jury trial in an obscenity prosecution has a significance greater than an ordinary criminal trial. See the dissenting opinion of Justice Brennan in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 448; and the dissenting opinion of Chief Justice Warren in *Times*

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[9]Moreover, in the case herein the trial court refused to instruct the jury that petitioner should be acquitted if he honestly believed that the material involved was not obscene, and petitioner was not permitted to place before the jury evidence of his lack of knowledge of the contents and knowledge that the material was obscene. Furthermore, the trial court refused to instruct specifically that the prosecution was bound to prove knowledge of the obscenity of the material and specific unlawful intent, and that the burden of persuasion was always upon the prosecution [Deft. Inst. Nos. 6, 8, 20, 21, 22, 23; R. 97, 101]. Such a trial denies both justice and the appearance of justice.

Film Corp. v. City of Chicago, 365 U.S. 43, 68-69. See also, the opinion of Justice Stewart in *Volanski v. United States*, 246 F. 2d 842 (6 Cir. 1957). The jury is the factfinder and, moreover, it is the factfinder in the more important sense since it is initially determining whether or not a writing shall be afforded constitutional protection and whether or not an accused shall be punished for the dissemination of a writing. It is for the jury to decide whether or not an accused in an obscenity prosecution has the guilty knowledge and unlawful intent which places upon the accused the stigma of conviction on a finding that the writing involved is obscene. Clearly, under such circumstances, for a State by its legislature, or by a judge in his rulings, to undermine the function of the jury by creating a "prima facie" case of guilty knowledge and unlawful intent, without proof in support thereof, is to deprive the accused indirectly of the guarantee of a jury trial.

An inference of guilty knowledge and unlawful intent merely from the sale of a writing found by a factfinder to be obscene is both irrational and unreasonable, and opens the door capriciously for the conviction of innocent persons. A publication which a jury has found obscene will inevitably lead the jury to subjectively assume that what the jury knows, the publisher, distributor or bookseller should also have known. Proof that a writing was sold does not rationally support a conclusion that the seller was aware of its alleged obscene character. *Speiser v. Randall,* 357 U.S. 513; *United States v. Romano,* 382 U.S. 136; *Tot v. United States,* 319 U.S. 463, *Bailey v. Alabama,* 219 U.S. 219.

The statute not only creates an irrational presumption, but it is a presumption which results in the abridgment and deprivation of fundamental constitutional rights. On its face, the statute is capable of sweeping within its ambit constitutionally protected expression and of inhibiting the circulation of the material protected by the provisions of the First Amendment. The statute thus places limitations on free speech and press, undermines procedural safeguards important in prosecutions involving speech and press and, in effect, unlawfully compels persons to take the stand in criminal prosecutions and prove the lawfulness of their conduct under onerous and unfair circumstances. "[W]e hold that when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." *Speiser v. Randall,* 357 U.S. 513, 528-529. See also, *New York Times Co., et al. v. Sullivan,* 376 U.S. 254; *Freedman v. Maryland,* 380 U.S. 51; *Miranda v. Arizona,* 86 S.Ct. 1602.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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APPENDIX A.

Constitutional Provisions and Statutes Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

3. The pertinent provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . ."

4. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

5. The pertinent provisions of Kentucky Revised Statutes, section 436.100 are:

> "(1) Where the term 'person' is used in this section, it shall be taken to mean any natural person, firm, partnership, co-partnership, association, corporation or organization of any kind.
>
> "(2) Any person who, with knowledge of the contents or character, sells, lends, gives away or shows, offers to sell, lend, give away or show,

has in his possession with intent to sell, lend, give away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manufactures or prepares any such matter or article, or who writes, prints, publishes or utters or causes to be written, printed, published or uttered any advertisement or notice of any kind giving information, directly or indirectly, stating or purporting to state, where, how, of whom or by what means any such matter or article named in this section can be purchased, obtained or had, or who employs, uses or permits any minor to do so, shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned for not more than six months, or both so fined and imprisoned.

. . .

"(4) The sale, loan, gift, showing or offer to sell, loan, or the possession with intent to sell, lend, give away or show of any book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image found to be obscene, shall be prima facie evidence that the seller, lender, giver or possessor who intends to sell, had knowledge of the obscene character of the printed matter, picture, photograph or figure. (1962, c. 273, § 2; subsections (1), (3) and (4) created by 1962, c. 273, §§ 1, 3 and 4)."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 16

WILLIAM L. AUSTIN ..... *Petitioner*

vs.

COMMONWEALTH OF KENTUCKY ..... *Respondent*

BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENT

The Kentucky statute which was amended in 1962 to expressly require proof of scienter and to create a rebuttable presumption of knowledge from the fact of sale, follows the presumption recommended by the American Law Institute Model Penal Code in Section 251.4(2). There is a rational connection between the fact of sale of obscene matter and the presumed fact of knowledge of its character. The prima facie presumption in the Kentucky statute does not remove the burden of proof from the Commonwealth but merely shifts the burden of going forward with the evidence to the defendant after the state has proved enough to make it just for the defendant to be required to repel what has been

proved with excuse or explanation. The Kentucky statute is not subject to the defect noted in *Smith v. California,* 361 U.S. 147 since the element of scienter is expressly required and the defendant is permitted to produce evidence to show that he lacked knowledge of the contents or the obscene character of the publication.

The trial judge instructed that the jury must find from the evidence beyond a reasonable doubt that petitioner had knowledge of the contents and the character of the magazines. The manner in which KRS 436.100 was applied in this case does not permit a conclusion that the effect of the evidentiary presumption was to authorize a conviction without sufficient proof of scienter. The requirement of scienter does not necessitate proof that a defendant knew subjectively that the material was obscene. It is only required that it be shown that the defendant had knowledge of the contents of the publication. There was sufficient proof of scienter in this case and it was not submitted to the jury solely on the basis of a statutory presumption of knowledge.

Rosen v. United States, 161 U.S. 29 holds that the subjective knowledge of the defendant of the obscene character of the publication which he sells is completely irrelevant. The Court in recent decisions has avoided passing on whether "honest mistake" as to whether the contents of a publication in fact constituted obscenity need be an excuse. The instruction requested by petitioner that he should be acquitted if the jury found that he had a good faith belief that the two magazines in question were not obscene should not have been given by the trial court since this was not the defense presented by petitioner. Petitioner defended solely on the ground that he had no knowledge whatever that the two magazines for which he was being prosecuted were offered for sale in his store, and did not know their contents. The evidence shows that petitioner knew that the group of girlie magazines

which he had segregated and classified as adult reading were of questionable character, and if he did not know of the existence or contents of the two titles in question, he should have known and is not excused by failure to make reasonable investigation. The facts in this case do not call for a re-evaluation of the *Rosen* statement of law since the evidence presented at petitioner's trial and the nature of his defense do not permit him to claim "honest mistake."

The trial court properly excluded evidence offered by petitioner consisting of copies of paperback books, a nudist magazine, and material taken from the Paducah public library, since such material was irrelevant to the prosecution and was not comparable to the two magazines in issue. Even as to material which might be considered similar in content and style, the fact that such material has been sold previously without governmental interefernce does not mean that such comparable material is not itself obscene. The fact that other publications equally bad have been sold without prosecution does not excuse the petitioner in selling the obscene material in question. Petitioner could not justify his lack of knowledge of the contents of the magazines in question by testifying that since he relied on the second class mailing permit issued by the United States post office there was no need for him to personally examine any material which he was selling.

ARGUMENT

I. SECTION 436.100 OF THE KENTUCKY REVISED STATUTES DOES NOT, ON ITS FACE AND AS CONSTRUED AND APPLIED, ABRIDGE FREEDOMS OF SPEECH AND PRESS AND DEPRIVE PERSONS OF LIBERTY WITHOUT DUE PROCESS OF LAW BY VIRTUE OF PROVIDING THAT THE SALE OF ANY PUBLICATION FOUND

TO BE OBSCENE SHALL BE PRIMA FACIE EVIDENCE THAT THE SELLER HAD KNOWLEDGE OF ITS OBSCENE CHARACTER

The Kentucky statute prohibiting sale of obscene literature under which petitioner was convicted, KRS 436.100, enacted in 1894, contained no express requirement of scienter from that date until 1962 at which time it was amended by the insertion of a provision in the definition of the offense that the sale of the obscene matter must be "with knowledge of the contents or character." Subsection (4) was also added which provides that the sale of any publication found to be obscene "shall be prima facie evidence" that the seller "had knowledge of the obscene character" of the material. Kentucky Acts 1962, Chapter 273.

The 1962 amendment to the Kentucky statute which had the effect of expressly requiring proof of scienter and creating a rebuttable presumption of knowledge from the fact of sale follows the American Law Institute Model Penal Code, 1962 Proposed official Draft, Section 251.4(2), which requires proof that a defendant "knowingly or recklessly" sold the obscene literature and establishes a presumption of guilty knowledge:

> "A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly."

Tentative Draft No. 6 of the American Law Institute Model Penal Code (May 6, 1957) offered in Section 207.10(7) two alternates to the prevailing statutory law on "scienter." The first would have created a rebuttable presumption of knowledge from the defendant's act of dissemination of the obscene material and placed the burden on defendant to overcome this presumption by "a preponderance of the evidence" to the contrary. The second alternative proposal in the 1957

draft suggested the same rebuttable presumption of knowledge but left with the prosecution the burden of proving "scienter" beyond a reasonable doubt. The 1962 Model Penal Code, Section 251.4(2), abandoned the first proposal and settled on the latter. The Comments on the 1957 Draft of the Model Penal Code, page 50, stated the advisability of a presumption of knowledge due to the logical connection existing between the fact of sale of material of predominantly prurient interest appeal and knowledge of its contents and quality:

> " . . . Since 'predominant appeal to prurient interest' is a material element of obscenity, the prosecution would have the burden of proving knowledge or recklessness as to this quality of the material, if no special provision is inserted here. We believe it appropriate to have special provisions, because of *the high probability that persons disseminating obscenity do know the contents and quality of what they dis seminate* and because of the exceptional difficulty of disproving beyond a reasonable doubt a defendant's assertion that the prurient appeal of the accused material was not apparent to him.
>
> "Accordingly we propose, in subsection (7), to establish a presumption that one who disseminates obscenity is aware of what is in the book or magazine that he distributes. . . ."

Section 251.4(2) of the Model Penal Code was cited with approval by Mr. Justice Brennan in *Mishkin v. New York*, 383 U.S. 502 (1966), footnote 9. Since the Court in that case aproved the scienter provision of the Model Penal Code, it necessarily also gave support to the special presumption therein inasmuch as such presumption is an integral part of the Model Penal Code scienter scheme.

In *Speiser v. Randall*, 357 U.S. 513 (1958) is was held that a statute affecting freedom of speech is violative of due process where it places upon a taxpayer the initial burden of

bringing forth proof and the continuing burden throughout the proceedings of establishing that he was not guilty of engaging in advocating the overthrow of the government by force. The opinion of the Court states that it is not within the province of a legislature to declare an individual presumptively guilty of a crime, and the legislature cannot provide that the finding of an indictment or mere proof of the identity of the accused shall create a presumption of the existence of all the facts essential to guilt. 357 U.S. 523, 524. However, the Court noted that the "burden of going forward with the evidence" at some stages of a criminal trial may be placed on the defendant after the state has proved enough to require the defendant to excuse his conduct or explain it:

> ". . . Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel wha has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' . . ."

The Comments on Section 207.10 of the 1957 draft of the Model Penal Code indicate that the effect of a presumption such as the one contained in KRS 436.100(4) is to make the case sufficient to convict unless the evidence negatives the presumed fact of knowledge of the character of the publication, but the burden of proof beyond a reasonable doubt still remains on the prosecution and does not shift to the defendant. See pages 16, 50, 52, 53 of Tentative Draft No. 6. KRS 436.100(4) did not operate to shift the burden of proof to the petitioner so that he was presumptively guilty of the offense, but merely shifted the "burden of going forward with the evidence" to him once the state had proved that he

made a sale of obscene literature in the regular course of his business, which raised a rational presumption and made a prima facie case that defendant had knowledge of the contents of the publication and the character of the material sold. Even in the absence of a statutory presumption of knowledge from the fact of sale, courts have seen the wisdom of establishing a prima facie case from proof of sale of obsence matter and requiring defendants to go forward with evidence showing lack of guilty knowledge or explaining their lack of knowledge. *State v. Hudson County News Co.*, 41 N.J. 247, 196 A.2d 225, 231 (1963); *State v. Oman*, 261 Minn. 10, 110 N.W. 2d 514, 523 (1961); *State v. Miller*, 45 W.Va. 59, 112 S.E. 2d 472, 478 (1960). *State v. Andrews*, 150 Conn. 92, 186 A. (2) 546, 552 (1962).

The Court decided in *Smith v. California*, 361 U.S. 147 that a statute punishing the mere possession by a defendant in his bookstore of any book determined to be obscene is violative of freedom of the press guaranteed by the First Amendment where it makes the bookseller criminally liable without knowledge, and thereby imposes absolute criminal liability for having obscene books in possession. The Kentucky statute under which petitioner was convicted is not subject to the defect condemned in the *Smith* case since (1) the vital element of scienter was expressly incorporated in the statute and there could be no conviction unless it was found that the sale of obscene literature was "with knowledge of the contents or character", (2) the Commonwealth was required to meet the burden of proof by producing evidence of a sale of an obscene publication under circumstances sufficient to warrant an inference of knowledge of the contents of the publication or its objectionable character, and (3) the evidentiary presumption of knowledge of the obscene character was rebuttable and defendant was permitted to introduce evidence to show that he lacked scienter in that he did not know, and could not reasonably have known, of the existence of material

of such character in his store, or that he knew of it but honestly believed, and had reasonable grounds to believe, that it was not obscene.

The trial court, in instructing the jurors, expressly required that they believe from the evidence beyond a reasonable doubt that the defendant "knowingly" had for sale at his Readmore News Stand the two magazines in question, and that "the defendant had knowledge of the contents and the character of said magazines." (R. 109). The jury, of course, was not instructed regarding any prima facie case or presumption favoring the Commonwealth. KRS 436.100 as construed by the trial court plainly required the evidence to show beyond a reasonable doubt that the sale was with knowledge of the contents *and* the character of the publications found to be obscene.

The manner in which KRS 436.100 was applied in this case does not permit a conclusion that the effect of the evidentiary presumption was to authorize a conviction without proof of scienter. It is apparent that the prima facie presumption provision of the Kentucky statute was not applied in this case so as to result in a conviction of a defendant who had established a defense of lack of knowledge of the contents or an honest belief that the publications were not obscene.

In order for the prosecution to meet the burden of proof on the issue of scienter, it is by no means necessary that there be evidence showing that a defendant knew subjectively that the material was obscene. *Rosen v. United States*, 161 U.S. 29 (1896) held that knowledge of the contents of the publication is sufficient and subjective knowledge of obscenity is irrelevant. This should be so, because a person can be charged with knowledge of the community standards and what a jury may decide to be obscene at any given time. The *Rosen* case was cited for this proposition in *Roth v. United States*, 354 U. S. 476 at 491, footnote 28. The majority opinion in *Mishkin*

made it quite clear that proof of subjective knowledge is not a constitutional requirement. *Mishkin v. New York*, 383 U.S. 502 (1966). All that is required to constitute sufficient proof of scienter is evidence of the circumstances of the sale justifying an inference that defendant had knowledge of the contents of the publication. Mr. Justice Brennan in *Smith v. California*, 361 U.S. 147 at 154 stated:

> ". . . Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his *awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

In this case it is clear that there was sufficient proof of scienter consisting of the following evidence:

1. Petitioner was a wholesale distributor of publications in this area and in such capacity procured and distributed the magazines in question to the retail bookstore owned and operated by him. (R. 39 Q. 14).

2. In 1960, some three years prior to the sale in question, the city commissioners of the city of Paducah, Kentucky made complaint to petitioner in his capacity as wholesale distributor of reading material regarding the objectionable features of the particular class of magazines known as girlie magazines. (R. 40 Q. 19; 44). Petitioner ceased supplying the girlie magazines to a certain retail store located near a school.

3. In May, 1963, some four months before the sale in question, petitioner met with several local ministers representing the Paducah Area Ministerial Fellowship to discuss complaints which the ministers had been receiving from the public regarding the class of magazines known as girlie magazines, which were being handled by petitioner as a wholesale distributor and in his retail store. (R. 23 Q. 15; 40 Q. 22). The concern expressed by the ministers at this meeting was not limited to complaints from parents of minor children but extended to obscenity in general (R. 24 Q. 2).

4. Following the meeting with the ministers, petitioner personally caused 25 to 30 girlie magazines in his retail bookstore to be collected and segregated from the rest of his material by placing them on a separate rack behind the cashier's counter so that sales of such magazines would be limited to adults only (R. 41 Q. 26). The magazines were stapled to prevent persons from leafing through them and looking at the pictures. (R. 34 Q. 60).

5. The covers of the girlie magazines showing pictures of nude or semi-nude females together with the titles of the various issues proclaim the nature of the publications and give notice of the character of the material. Petitioner's Exhibits No. 2 and No. 3 are photographs of the rack of girlie magazines in his retail store and no one glancing at this prominent display could help being unaware of the nature of the publications and their intended prurient appeal. (R. 35).

It has been held by the highest state courts of several jurisdictions that in regard to obscene girlie magazines or nudist magazines proof of scienter may be found in the covers bearing photographs of nude or semi-nude women so that even the most casual observation or cursory examination could not fail to acquaint the seller with the nature of the contents and character of the material. See *State v. Chobot*, 12 Wis. 2d 110, 106 N.W. 2d 286 at 291, 292 (1960) involving four girlie magazines, including "Spree". Appeal dismissed for want of a substantial federal question. *Chobot v. Wisconsin*, 368 U.S. 15. *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 at 230 (1963) involving five girlie magazines, including "Spree". *State v. Andrews*, 150 Conn. 92, 186 A. 2d 546 at 552 (1962) involving two girlie magazines. *Chicago v. Doe*, 47 Ill. App. 2d 460, 197 N.E. 2d 711 at 715 (1964) involving a girlie magazine. *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 at 862 (1964), three nudist magazines. *Missouri v. Vollmar*, 389 S.W. 2d

20 at 29 (1965), eight nudist magazines. Significant evidence of scienter consisting of "the transparency of the character of the material in question, highlighted by the titles, covers, and illustrations" was noted by Mr. Justice Brennan in *Mishkin v. New York*, 383 U.S. 502.

It thus appears that there was sufficient evidence of scienter presented here to warrant petitioner's conviction. *Mishkin v. New York*, 383 U.S. 502 (1966). The case was not submitted to the jury on the basis of a statutory presumption of knowledge and it was obviously not necessary to do so.

II. THE KENTUCKY STATUTE, ON ITS FACE AND AS CONSTRUED AND APPLIED, DOES NOT ABRIDGE FREEDOMS OF SPEECH AND PRESS AND DEPRIVE PERSONS OF LIBERTY WITHOUT DUE PROCESS BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY THAT PETITIONER WAS ENTITLED TO AN ACQUITTAL IF THE JURY FOUND THAT HE HAD A GOOD FAITH BELIEF THAT THE PUBLICATIONS IN QUESTION WERE NOT OBSCENE

The Court in both *Smith v. California*, 361 U.S. 147, 154 and *Mishkin v. New York*, 383 U.S. 502 avoided passing on whether "honest mistake" as to whether the contents of a publication in fact constituted obscenity need be an excuse as a matter of constitutional principle. *Rosen v. United States*, 161 U.S. 29 held that if the one disseminating the material knew or had notice of its contents, the offense is complete although the defendant himself did not regard the publication as one that the statute forbade. See the approval given to this statement in *Roth v. United States*, 354 U.S. 476 at 491, footnote 28.

It cannot be said that KRS 436.100 on its face prohibits a good faith belief defense. The prima facie case created by subsection (4) of knowledge of the obscene character of the material is clearly rebuttable by the terms of the statute.

The trial court in this case instructed the jury that it must believe from the evidence beyond a reasonable doubt that petitioner "knowingly" had the magazines at his retail bookstore with the intent and purpose that they be sold, and that the defendant "had knowledge of the contents and character of said magazines." (R. 109). Petitioner requested the Court to give a total of 51 separate instructions, among which was instruction No. 19 (R. 100) which would have provided:

> "If you find that the defendant had a good faith belief that the magazines in question were not obscene, you must acquit the defendant even if you personally believe that the magazines are obscene."

The facts in this case do not call for a re-evaluation of the *Rosen* statement of law since the evidence presented at petitioner's trial and the nature of his defense do not permit him to claim "honest mistake."

An honest mistake concerning the obscenity of the material necessarily implies that the mistake must be a reasonable one. An unreasonable belief that the law protects certain material is equivalent to a distributor deliberately remaining uninformed as to the facts of the material. In order for a defendant to present a defense of good faith belief that a certain publication was not obscene, he must not only testify that he honestly did not regard it as obscene but must also show that he had reasonable grounds for such belief. The commentary on Section 207.10 of the American Law Institute Model Penal Code, Tentative Draft No. 6, page 51, indicates that the drafters believed that the type of case in which this defense might properly be presented would be "those cases admitting of a respectable argument that the appeal of the

material is predominantly artistic or scientific." In the present case the nature of the publications in question shows that petitioner could have had no reasonable grounds for believing that they were not obscene, and the evidence indicates he recognized that this class of material had definite appeal to the prurient interest of the public so that sales should be limited to adults only.

This Court has declined to review three cases in which girlie magazines were held to be obscene as a matter of law by state supreme courts under the test set out in the *Roth-Alberts* case, 354 U.S. 476. In *State v. Chobot,* 12 Wis. 2d 110, 106 N.W. 2d 286 (1961) it was held that girlie magazines were obscene which contained numerous photographs of nudes and semi-nudes in provocative poses, many of them on beds and davenports, with the pictures providing an appropriate setting for accompanying sex stories. One of these magazines was "Spree." The appeal to this Court was dismissed for want of a substantial federal question in *Chobot v. Wisconsin,* 368 U.S. 15. In *Monfred v. State,* 226 Md. 312, 173 A. 2d 173 (1961), although the state court was of the opinion that "mere nudity in and of itself" is not obscene, it found five girlie magazines to be obscene as a matter of law where they presented numerous pictures of nude or semi-nude women showing "come hither" expressions and poses interspersed with pointedly suggestive sex stories. This Court denied certiorari in *Monfred v. Maryland,* 368 U.S. 953. See also *Goldstein v. Virginia,* certiorari denied, 372 U.S. 910 (1963). For other decisions of state appellate courts holding girlie magazines to be obscene, see *State v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *State v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (1963); *Cincinnati v. King,* (Ohio) 152 N.E. 2d 23 (1958).

It thus appears that at the time these issues of "Spree" and "High Heels" were purchased from petitioner's bookstore in September, 1963, there was good reason for petitioner to

believe that there was a serious question as to the obscene content of the rack of 25 to 30 girlie magazines which he had ordered segregated and displayed for sale in his store. Petitioner should have exercised special care in examining this particular small group of magazines and selected for sale to the general public only those issues with which he was familiar and which he believed with reason could not be said to be patently offensive measured by current community standards. Petitioner testified (R. 38, 41):

"76. Do you yourself know or did anybody ever advise you that these two magazines were on the stand?

"A. They did not.

"29. How long have you sold the publication known as Spree?

"A. I do not know.

"30. How long have you sold the publication known as High Heels?

"A. Frankly, I didn't even know there was a High Heels. I had heard of Spree, but I never knew of High Heels."

It appears that petitioner's defense with respect to "High Heels" was that he did not even know of the existence of a magazine by that name. His defense as to the notorious "Spree" was that, while he had heard of it, he had no idea that it was included in the 25 to 30 girlie magazine titles which he had selected and ordered displayed behind the cashier's stand in his store. Such defense is not that of "good faith belief that the magazines were not obscene." In this type of case there is certainly no cause for the trial court to instruct on a good faith defense, even if it should be held that as a matter of constitutional principle such defense must be allowed.

III. THE KENTUCKY STATUTE IS NOT UNCONSTITUTIONAL AS CONSTRUED AND

APPLIED BECAUSE THE TRIAL COURT EXCLUDED FROM CONSIDERATION BY THE JURY ORAL AND DOCUMENTARY EVIDENCE SHOWING THAT PETITIONER HAD NO KNOWLEDGE OF THE CONTENTS OR OF THE OBSCENITY OF THE PUBLICATIONS IN QUESTION

Petitioner's chief defense in this prosecution was that the two magazines "Spree" and "High Heels" were not obscene. As noted under the preceding argument, so far as the issue of knowledge of the contents or of the obscenity of the publications was concerned, petitioner's defense was that he did not know there was such a publication as "High Heels" and, although he had heard of "Spree", he did not know any issues of such magazines were in his retail bookstore.

Petitioner offered to introduce copies of pictures taken from books in the Paducah public library which portrayed the nude human body. The books from which these pictures were copied were "Masters of Modern Art", "Greek Sculpture" and "Pictures That Talk, U. S. Camera, 1959." (R. 64, 65). The purpose of these pictures was to prove that photographs of nudes were contained in many publications accepted in the community, and therefore nude photographs in the two girlie magazines could not make those publications obscene. The trial court rejected these items, and properly so, since they were not in any sense comparable to the publications on trial or relevant to the prosecution. The fact that nudity may be accepted in recognized works of art does not mean that photographs of nudes in the style and format of girlie magazines are acceptable under contemporary community standards. Petitioner could not reasonably have believed that the portrayal of the nude form in Greek sculpture or in pictures in the museum of modern art or in serious photographic issues meant that the girlie magazines could not be obscene. He did not testify that this was his belief.

Petitioner also sought to introduce in evidence six paperback books including "Tropic of Capricorn", and other so-called literary works containing questionable passages of prurient appeal. It was not shown that petitioner had read these books. The books were rejected as not being relevant to the prosecution. (R. 60, 61). The paperback books, being literary works, were not comparable to the magazines in issue and had no bearing whatever on the case. It has not been established that such books cannot legally be the subject of obscenity prosecutions.

A certain issue of Sunshine and Health nudist magazine was offered in evidence which had been involved in a suit to enjoin the U. S. Post office department from confiscating issues of the magazines, in which this Court granted the injunction. (R. 62). The trial court refused to permit this in evidence. It was not shown that petitioner was acquainted with this magazine. Only the two girlie magazines were on trial and a nudist magazine is not of the same class as "Spree" and "High Heels." See Commentaries on the Law of Obscenity, Vol. 1, No. 2, (November, 1965) published by Citizens for Decent Literature, Inc., pages 1-21 to 1-30, for a discussion of evidence of the preparation of girlie and nudist magazines and the distinction between the two classes of publications. It is obvious that nudist magazines may, and have been held to be, just as objectionable or more so, and are not immune from obscenity charges.

Other publications appearing in commerce are not relevant in an obscenity trial of a defendant for selling a particular magazine for the reason that there is no proof that such offered items are themselves non-obscene, and the fact of sale of other possibly objectionable publications without prosecution would not palliate the sale by the defendant. *State v. Ulsemer*, 24 Wash. 657, 64 P. 800; *New York v. Finkelstein*, 11 N.Y. (2) 300, 183 N.E. (2) 661, cert. denied, 371 U.S. 863; *Womack v. United States*, 111 U.S. App. D.C. 8, 294, F. 2d 204,

206, cert. denied, 365 U.S. 859; *United States v. West Coast News Co.*, 228 F. Supp. 171, affirmed in 357 F. 2d 855. At the very least, other publications offered as exhibits should be similar in content and style to the questionable material upon which the prosecution is based.

The trial court sustained an objection to a question asked petitioner of "whether it would be possible for your concern to economically run an outfit like Readmore and personally censor each of those ten or eleven thousand titles?" The answer by avowal was that "it would be almost humanly impossible to read everything we handle." (R. 30, 31). However, petitioner had segregated 25 to 30 different girlie magazines and placed them on a separate rack behind the cashier's stand in his retail store. It was not necessary for him to read everything that he handled. It was only necessary that he take the trouble to scan the small group of magazines which he himself had classified as having prurient interest appeal and the sales of which he had limited to adults only. A dealer in publications cannot be permitted to offer as a defense the fact that his business was so big and involved so many different publications that he could not possibly be aware of what he was handling.

Petitioner stated that instead of trying to keep abreast of the nature of the material handled in his business, he relied on whether the publications had a second class mailing permit from the U. S. post office. He was permitted to testify (R. 30):

> ". . . . We use the second class permit quite a bit. We feel like a magazine that don't have a second class permit *maybe* should be withheld from general distribution, *but frankly, I can't see any difference* in the ones that have and don't have. . . . We have tried to use it as a barometer. *We have not completely done so* but we stay very close to that. At least we ask our publishers to recognize that." (Emphasis added)

Objections were sustained to questions asking petitioner to testify as to the meaning from the standpoint of obscenity of

a second class mailing permit from the United States post office (R. 31 Q. 44; 33 Q. 52), and whether other named magazines not involved in the prosecution had such second class permits. (R. 32 Q. 45). However, petitioner was allowed to answer a question as to whether all the girlie magazines shown in his Exhibits No. 2 and No. 3 had second class permits. (R. 35 Q. 68). There was no attempt to show whether "Spree" and "High Heels" had second class permits.

The granting of a second class mailing permit by the Federal postal authorities is not proof that the material is not obscene in a state prosecution, and furnishes no reason for petitioner to abdicate his responsibilities as to examination of a class of material known by him to have prurient appeal and concerning which he had received complaints. If petitioner did in fact rely on the second class mailing permit rather than looking at the girlie magazines himself, his action in doing so was not reasonable under the circumstances. A defendant cannot justify lack of knowledge of the contents or obscenity of certain magazines by the flimsy device of alleged reliance upon a second class mailing permit from the U. S. post office. The trial court properly excluded evidence to the effect that administrative determinations of the post office department concerning whether magazines should have second class mailing privileges are so indicative of the obscene or non-obscene character of the material as to enable a dealer to rely on them and dispense with the necessity of acquainting himself with the contents.

Objections were sustained to questions asking petitioner whether all of the girlie magazines shown on display in his store in his Exhibits No. 2 and No. 3 had been sold in the entire area without being banned or restricted by any governmental authority or community group. (R. 36 Q. 72; 37 Q. 73). But he was permitted to testify that he had been selling this same type of magazine for years and there had never been an objection "that we didn't observe and correct." (R. 36 Q.

69, 70). Assuming that the other girlie magazines in petitioner's Exhibits No. 2 and No. 3 were in fact similar in content, style and degree to "Spree" and "High Heels", there is no showing that none of them could be suspected of being obscene, and petitioner's own testimony contradicted any implication that there had never been any complaints and that sales of this type of magazine were apparently quite acceptable to the community.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

William L. Austin v. Commonwealth of Kentucky, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

Petitioner William L. Austin is both a wholesale and retail news distributor. His wholesale news distributorship business services approximately 300 towns with periodicals, paperback books, comic and children's items, bibles, and anything in the general appeal reading field, including girlie magazines like High Heels, Vol. 2, No. 6 and Spree, Vol. 1, No. 38, from agencies in Shellyville, Tennessee; Jackson, Tennessee; Nashville, Tennessee; Carbondale, Illinois and Paducah, Kentucky. [R.

27, 28, 37; Commonwealth Exs. 1, 2.] His Paducah distributorship, Basin News Company, services southeastern Missouri from Cape Girardeau south to Poplar Bluff.

In Paducah, Kentucky, petitioner has operated his wholesale distributorship, Basin News Company, since 1946, and for the last 12 years has also owned and operated a large retail bookstore and newsstand known as Readmore Newsstand located on North Fifth Street between Kentucky and Broadway. [R. 6, 28, 38.] At the Readmore Newsstand he sells books, technical books, religious books, children's books and girlie magazines like High Heels, Vol. 2, No. 6, and Spree, No. 38 at retail. [R. 7, 28, 29, 35; Commonwealth Exs. 1, 2; Deft. Exs. 2, 3] he received from his wholesale distributorship Basin News Company in Paducah.

In May of 1963, a Committee on Moral and Social Welfare of the Ministerial Association, naming among its members the minister of the First Presbyterian Church, the minister of Trinity Baptist Church, and the minister of St. James A.M.E. Church, met with the petitioner and his son in the First Christian Church. [R. 22.] The Committee told petitioner that complaints had come to them as pastors, through the Committee of the Paducah Area Ministerial Fellowship and that they were interested in ascertaining the rules or standards he was maintaining in his store. [R. 24.] They talked about obscene literature in general and about a particular class of magazines, the girlie magazine. [R. 23.] The Committee illustrated what they were talking about by the use of two magazines. [R. 24.] They spoke in general terms and mentioned only one title: [R. 41.]. Petitioner indicated that there were many of this type

of magazine that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults. [R. 24.] Petitioner didn't make any commitment but promised them if they would let him know *what the magazine was* that he would look at *it* and give *it* his attention. [R. 25.] He agreed to withdraw any *magazines that the group found objectionable.* [R. 26.]

Following this discussion, petitioner removed the girlie magazines (25 to 30 titles) to a rack behind the cashier's stand where they had to be asked for by name. [R. 41.]

On September 28, 1963, Mrs. Kathleen Wathen, a private citizen from Paducah, Kentucky, visited Readmore News Agency and observed that the girlie magazines were segregated behind the counter. [R. 28.] She asked for High Heels, Vol. 2, No. 6 and Spree, No. 38 by name, having been given one name by a Mr. Copeland, and having seen earlier editions of another magazine at a person's house. [R. 7, 12.] Petitioner's employee sold her the magazines which were stapled shut. Only the girlie magazines which were behind the cashier's stand were stapled shut. [R. 8, 15.] Earlier in the summer she had purchased another magazine of the same type. At that time they were in the open. [R. 11.]

On October 11, 1963, Mrs. Wathen swore out a complaint alleging that on September 28, 1963, the petitioner:

> "Did unlawfully with knowledge of the contents or character sell, offer to sell, have in possession with intent to sell and offer to sell two magazines, to wit: Volume 1, No. 38 of a publication known as 'Spree', and Volume 2, No. 6 of a publication

known as 'High Heels', both of said publications being obscene and containing obscene pictures and writings or printed material of an indecent character."

and filed the same in the Quarterly Court of McCracken County, Commonwealth of Kentucky. [R. 1, 2.] On the same date, Judge Roy Stewart, Judge of McCracken County Court considered the complaint and issued a summons commanding the petitioner to appear at a formal hearing in the McCracken County Court on October 14, 1963. [R. 2.]

The case came on for trial before a trial commissioner and a jury sitting in the Quarterly Court of McCracken County, Kentucky. The jury found petitioner guilty as charged and fixed the punishment at a fine of $100. [R. 3.] Petitioner appealed to the Circuit Court of McCracken County, Kentucky, where on February 28, 1964, in accordance with Kentucky Criminal Procedure, the case was tried *de novo* to a second jury before the Honorable C. Warren Eaton, Judge of the McCracken Circuit Court. [R. 3, 4, 5.]

Commonwealth of Kentucky: Case in Chief.

It was stipulated by the parties that the defendant William L. Austin was the owner and operator of Readmore Newsstand on September 28, 1963, prior to and since that time.

Katherine Wathen, a resident of Paducah, testified that she was in the Readmore Newsstand on September 28, 1963, at which time she asked the saleslady for four specific magazines. [R. 6, 7.] She was informed that the store was "out of two of them" and was given High Heels, Vol. 2, No. 6 [Commonwealth Ex. 1] and Spree

No. 38 [Commonwealth Ex. 2], which she purchased for $1.00 each plus tax. [R. 7.] She described the layout of the store as having book shelves of paperback books, magazine racks filled with magazines and places for cards, postcards, occasional cards and newspapers. Spree and High Heels were on a rack behind the cashier's stand. Purchasers could see the magazines but had to ask for them by name. These were segregated from other magazines which were accessible to everyone. [R. 8.]

Mrs. Wathen testified that in the trial below the petitioner has testified that Readmore Newsstand had gotten the girlie magazines Spree and High Heels from Basin News Company, owned by the petitioner. [R. 10.]

On cross-examination by the defense attorney, Mrs. Wathen testified that she had been to Readmore Newsstand in the early summer of 1963 "approximately twice" and had purchased magazines "of this type" at that time. [R. 11.] At that time the magazines were out in the open and were not behind the counter. She stated that she had gotten the name of one of the magazines from a Mr. Copeland in Mayfield and had seen an earlier edition of the other magazine at someone's house. She had thumbed through Cavalier and Dude but did not consider them as bad as these two. [R. 12.] She denied that an organization known as Citizens for Decent Literature had furnished her the names of the magazines. She said she did not belong to a censorship organization known as Legion of Decency. [R. 13.] Mrs. Wathen stated that the magazines behind the cashier's stand were stapled but the other magazines were not. [R. 15.] She had not personally made any complaints to Mr. Austin and had not furnished Mr. Austin or his

employee with a list of magazines or books that she considered obscene but she said she knew the ministers had presented Mr. Austin with the names of some that they objected to. [R. 14.] She said that she had called Mrs. McWaters to tell her that she was going to make the purchase and would like for her to be present while she was there. [R. 15.] She stated that she was present at the trial below and had heard Mr. Austin testify that he did not know these two magazines were there but that she did not believe him. [R. 16.]

On redirect examination by the Commonwealth attorney Mrs. Wathen testified that she had heard Mr. Austin testify in the trial court below that there had been complaints from the ministers of children reading and buying those magazines, that they had asked him to please do something about them and that he (Mr. Austin) had built the rack and put these stapled magazines behind the cashier's stand. [R. 17.]

On recross-examination by defense attorney, Mrs. Wathen said that her testimony as to what was said in the trial below was as to her knowledge, as far as she could remember and that she could not remember word for word. [R. 18.]

Mrs. Patsy McWaters, a resident of Paducah, Kentucky, testified that Mrs. Wathen had called her on September 28, 1963, and asked if she would come down to Readmore Newsstand. She said she went down and observed Mrs. Wathen make the two purchases. [R. 19.]

On cross-examination by the defense attorney Mrs. McWaters said she had been to the Readmore Newsstand a number of times both before and since September 28, 1963. She stated that she and Mrs. Wathen belonged to the Catholic church. [R. 20.]

On redirect examination by the Commonwealth attorney, Mrs. McWaters testified that neither she nor Mrs. Wathen belonged to an organization known as Citizens for Decent Literature. [R. 20.]

Reverend Herbert Simpson, pastor of the First Christian Church in Paducah, testified that in May of 1963 he was chairman of the Ministerial Association Committee on Moral and Social Welfare and that among its other members were the minister of the First Presbyterian Church, the minister of Trinity Baptist Church, and the minister of St. James A.M.E. [R. 21, 22.] At that time a meeting was held in the First Christian Church with the petitioner and his son who were there by invitation. The matter of obscene literature had been discussed at a previous meeting and the meeting had been arranged so that Mr. Austin could speak to the entire committee. [R. 22.] During the meeting the committee mentioned to the petitioner that complaints had come to them as pastors through this Committee of the Paducah Area Ministerial Fellowship and that they were interested in ascertaining the rules or standards he was maintaining at his store, which was why the committee had him before them. [R. 24.] Reverend Simpson stated that the committee talked about obscene literature in general and about a particular class of magazine, the "girlie magazine". [R. 23.] He stated that the petitioner indicated that "there were many of this type of magazines that he had cleated or stapled together so that they could not be thumbed through by either teenagers or adults". [R. 24.]

On cross-examination by the defense attorney Reverend Simpson stated that the organization did not specifically name any magazine but that they illustrated

what they were talking about by the use of two magazines. He stated that their complaint was not altogether about a fear that minors would get hold of the material, which was the complaint which they had been receiving from parents, but that they were concerned with obscenity in general. [R. 24.] Asked how long he had belonged to the CD(A)L, he answered "within the (last) month". [R. 24.] He stated he didn't recall the petitioner making any commitment, but that the petitioner told them to call his attention to anything which came to hand that they considered obscene [R. 25] and admitted that the petitioner did agree to withdraw "any magazine that you named that you found objectionable" [R. 26.]

The Commonwealth of Kentucky rested its case.

William L. Austin: The Defense.

The defendant William L. Austin testified that he was in the wholesale news distributor business having agencies in Shelbyville, Tenn., Nashville, Tenn., Jackson, Tenn., Carbondale, Ill., and Paducah, Ky., the latter agency serving southeastern Missouri from Cape Girardeau south to Poplar Bluff. [R. 27.] These agencies serviced all periodicals, paperback books, comics, and children's items, bibles and anything in the general appeal reading field, including girlie magazines, like Spree Vol. 38 and High Heels, Vol. 2, No. 6. [R. 28, 37.] He also owned and operated the Readmore Newsstand, a retail business in Paducah which sold hardback books, paperback books, technical books, religious books, children's books, newspapers and magazines, and girlie magazines like Spree and High Heels and was a member of the American Booksellers Association and

Christian Booksellers Association. [R. 29.] He stated that in a month's time the Readmore Newsstand handled approximately 3,000 titles of magazines, approximately 4,000 titles of hardback books, and approximately 4,000 titles of paperback books.

Asked what, if anything, he had done to attempt to regulate or limit the type of literature disposed, the petitioner stated that "we use the second-class permit quite a bit. We feel like a magazine that don't have a second-class permit maybe should be withheld from general distribution, but frankly, I can't see any difference in the ones that have and don't have." and "we have tried to use it as a barometer. We have not completely done so but we stay very close to that. At least we ask our publishers to recognize that." [R. 30.] Asked whether it would be possible for his concern to economically run an outfit like Readmore Newsstand and personally censor each of those ten of 12,000 titles, he answered, "It is impossible" before an objection to the question was sustained. His answer by avowal was "It would be almost humanly impossible to read everything we handle." An objection was sustained to the question, "Does the fact that a publication has the second-class permit of the public post office department mean that that publication has been approved as far as obscenity is concerned, as far as it being sent through the United States mail?" The answer by avowal was, "It means the post office has considered it fit to be mailed at the reduced rate of second-class [R. 31, 32]." Asked if he had any other policy at Readmore as far as the sale of objectionable material is concerned, he said "I remove from sale any publication that they feel is offensive to them or their representatives. All they have

to do is advise me what they wanted taken off." [R. 32.] He stated that he had asked certain groups for a list but that to date he had not been furnished any list for guidance [R. 33.] An objection was sustained to a question "Does the fact that a magazine does not have a second-class permit mean that it has been turned down by the Post Office Department, or does it mean that it hasn't been considered by the department?" His answer by avowal was, "It could mean either that they didn't apply or were refused". [R. 33.]

An objection was sustained when the defense attorney attempted to introduce a letter dated February 8, 1958, from the petitioner to Ray Kirk, president of All State News Company, Chicago, Illinois, the distributor of High Heels and Spree. [R. 34.]

The petitioner stated that the policy of the store before the magazines were removed behind the counter was to staple them because at the "suggestion of people and pastors, and people who thought they know what the community should have, that these magazines would be better displayed stapled, so we went to the expense of stapling them so no one could observe the contents of the magazines." and "not only did we staple these magazines, we stapled the hot rod magazines that are bought by the younger generation; we stapled some of our picture magazines that had eye-appeal but were just pictures and quickly examined, and that was the reason these magazines were stapled." [R. 34, 35.]

The petitioner identified photographs of the girlie magazine rack behind the cash register [Deft. Exs. 2, 3] and said that as far as he knew all of these magazines have the second-class mailing privilege. [R. 35, 36.]

Petitioner Austin testified that there had never been an objection as far as the community was concerned that they didn't observe and correct and adjust. He stated that there had never been an objection to any of the magazines by title and "that is what we wanted and asked for." [R. 36.] He stated that all of the girlie magazines shown on Exhibits 2 and 3 were distributed by his agency to approximately 300 towns serviced by his wholesale business distributorship. [R. 36.] An objection was sustained to the question whether those magazines had been banned or restricted by any governmental authority or community or group in any of the areas they were sold in. His answer by avowal was, "Not to my knowledge. There has been no general restriction on the sale of these magazines." [R. 37.]

Petitioner stated that he did not know, nor did anyone advise him that High Heels, Vol. 2, No. 6 and Spree, Vol. 1, No. 38 were on the stand and that he immediately removed them when he received the summons and had not sold them since. [R. 38.]

On cross-examination by the Commonwealth attorney, petitioner stated that he had been in the wholesale magazine selling business in Paducah since 1946, doing business as Basin News Company and had operated the retail store Readmore Newsstand for 12 years and was the owner and operator of both businesses. [R. 38.] He stated that Spree and High Heels were received from All State News Company by Basin News Company which made distribution to the various retailers, including Readmore Newsstand. He stated that when they reached his retail outlet, it was determined that they were called adult reading and placed in the segregated slots behind the checkout counter. [R. 39.]

Petitioner stated that on the occasion of the meeting with the ministers in May of 1963, objections were stated in a very general way, "They didn't specify any titles, they spoke in general terms. There was one title mentioned at the time, only one." He stated because of that meeting he "removed those magazines to behind the cash register, and there would never be any question at all about adults only buying them or seeing the magazine." About 25 to 30 titles were involved. [R. 41.]

Petitioner stated that he had heard of Spree, but he never knew of High Heels. [R. 41.] He stated that he considered the magazines were in poor taste but that he did not consider the two magazines obscene. Asked to read page 58 of Spree he said he did not consider that obscene. He considered that "clinical more than anything". [R. 42.] He said he read Playboy and considered Spree practically the same kind. [R. 43.] Asked if as a retailer he felt that he bore any responsibility to the community as to what he sold, he answered "I certainly do."

On redirect examination by the defense attorney, petitioner stated that in 1960 a complaint had been made about magazines such as Esquire, Cavalier, Dude, and Gent being near a school and that they were removed, although they were not objectionable in his mind. [R. 44.] He stated that because of his business activity he was in Paducah only about 30 per cent of the time. [R. 45.]

Mrs. Curelia Staudt testified that she had been employed as a clerk at Readmore for five years. [R. 45.] She stated that the magazines in evidence or magazines like them were moved behind the cash register because

Mr. Austin had said he had some complaints and wanted them moved there so they could see who bought them. She was instructed when she went to work there that they were not to sell them to anyone under 21 years of age. [R. 46.] She stated that the girlie magazines were not stapled now but that "at one time they had some of them stapled" to keep people from reading them the adult magazines, hot rod magazines, and car magazines had been stapled, that "they would stand there and leave through them" and "and never buy them". [R. 47.]

Mrs. Staudt stated she did not see Mr. Austin too often and that he came in about once a week. [R. 48.]

Wade Sherrill testified that he was a receiving clerk and general warehouse manager for Mr. Austin, Basin News Company, and had worked for him for approximately 9 years. [R. 49, 50.] He stated that Basin News Company received "close to a thousand different titles every month, and about a half million copies per month." He stated that the petitioner was hardly ever at Basin News Company and that they were lucky to see him every three weeks or 10 days. He stated that he had complete authority in the warehouse. [R. 49.] An objection was sustained to a question whether "you have any instructions or policy so far as distributing magazines that do not have second-class mailing permits". His answer by avowal was "We don't put any out that doesn't have second-class mailing permits. That is my instructions." [R. 49, 50.] An objection was sustained to the question whether it was "possible for your organization to check all of the publications you handle so far as what's in them and things of that kind." His answer by avowal was "It is impossible for us to

check everything. The only thing we check now is second-class mailings."

Asked by the Commonwealth attorney on cross-examination how long he had been "warehouse manager" he stated, "I will say about a year. I am warehouse manager when Bob Austin, Mr. Austin's son is out of town, and most of the time he is out of town here lately."

Dr. C. S. Lowry testified that he was employed at Murray State College at Murray, Ky., and had been for 40 years where he was now a professor and head of the department of social science; that he had a Bachelor of Arts degree, two Master of Arts degrees and one PhD degree. [R. 51.]

Dr. Lowry stated that "so far as I know, and I have made a very careful search, there has been no study made which establishes it to be a fact that this kind of literature has any adverse effect, and I might say, any good effect." [R. 53.] Asked by the court whether he was referring to society as a whole, he said, yes. An objection was sustained to a question whether or not there was an opinion in his field of study that "magazines of the so-called girlie magazine type serve a good purpose as an outlet for some people". His answer by avowal was "There is reason to believe that this kind of a material does have an effect to disgust one with sex." [R. 53.]

Dr. Lowry testified that "the purpose of the magazine in my opinion is to make money, and they use sex, just like they do in selling Camel cigarettes, as a come-on".

An objection was sustained to a question whether or not "this particular type of magazine and Playboy and

Dude and Cavalier, those types of magazines, are generally sold and accepted in Kentucky, West Tennessee, Southern Illinois, the entire area". His answer by avowal was "This type of magazine is sold very widely in this area." He then testified that this type of magazine has been sold in this entire area for a long number of years and accepted by the various committees and that "they have been sold and I have purchased, unfortunately, some during my—." [R. 55.] Asked what he meant by "unfortunately" he said "I mean by that that this is cheap stuff and unpleasant, and you don't like to deal with it, but since you are responsible for directing certain people, you are supposed to know what they consume by way of vision and reading and whatnot", [R. 56.] He stated that Spree and High Heels do not go as far beyond the customary limits of candor in the community as some which are generally accepted". [R. 56.] He stated that they would not create a desire or shameful or morbid interest in nudity or sex in the average person who might examine them but on the contrary "would seem to disgust one with the whole subject of sex, they are so cheaply and poorly done". [R. 56.] An objection was sustained to a question as to whether the pictures in the two magazines were any more revealing of the human body than pictures in other publications accepted by the various communities all over the country. Dr. Lowry then testified that in his opinion the articles in Spree were not unsavory, that two, "The New Boom in White Slavery" and "I Plotted Adolph Hitler's Murder" were somewhat educational on a pretty low level and were not objectionable and that the story "Double Date" was racy but was not obscene. [R. 57.] An objection was sustained to a

question as to whether the magazine stories go any further in its description of sex than various books or publications and whether an article in the current issue of Reader's Digest on sex went further. His answer by way of avowal was "There is an article which goes further than any article in this number of Spree or High Heels." [R. 58.]

On cross-examination by the Commonwealth attorney, Dr. Lowry stated that the magazines do not appeal to the prurient interest and that they appeal to "curiosity, on the part of some". Asked what he meant when he said the magazines were published to make money out of sex he said, "I said they use sex as a come-on to sell advertisements maybe, or something else. That is the way it is used in selling Camel cigarettes." He said he considered the books racy. [R. 60.]

On redirect examination by the defense attorney, an offer to introduce six books in evidence through the witness [Exs. 4 through 9] as having been sold and accepted in Western Kentucky and Western Tennessee was denied. The court ruled "We only have the two magazines on trial." [R. 61.]

James Apple testified that he was an attorney and associate of the defense attorney. An objection was sustained to the introduction into evidence of a record of the case "Sunshine Book Co. v. Summerfield," involving the nudist magazines Sunshine and Health and Sun. [Ex. 10.] The answer by avowal was that the U.S. Supreme Court, in sustaining the injunction in the *Sunshine Book Co.* case, prevented the Post Office Department from confiscating the magazines. An objection to a question as to whether the nudist magazines

there involved were more revealing was also sustained. The answer by avowal was, "The magazines in question are more revealing in that they show front views of both nude males and females." [R. 62.]

C. L. Werner testified that he was an investigator employed by the defense attorney. He said that he had gone to the Carnegie Library in Paducah and made copies of pictures in various publications and books. [R. 63.] An offer to introduce these photographs [Exs. 11 through 19] was refused as irrelevent. [R. 66.]

William L. Austin, the petitioner, was recalled by the defense attorney and asked with reference to All State News Company, the distributor of the two magazines in question, "How many other companies of that nature does the Basin News Company do business with?" The petitioner answered, "Well, of any nature, about 12 to 14 companies, with approximately 1,000 titles a month." He stated, "We have a blanket contract with these companies, we signed that, because it would be impossible for them to send us every publication and every book and ask us to review it and then give an order. We have a blanket arrangement with them and they ship us anything they happen to distribute or publish, and we never set our order, we don't tell them how many to send us, or how few to send us. They use their own judgment on figures and statistics they have for the order that they will send us. We never order a publication, it is automatically sent to us under blanket contract."

Commonwealth of Kentucky: Rebuttal.

Frederick G. Schlafer, testified that he was the pastor of the Baptist Tabernacle in Paducah; that he had a Bachelors Degree with a major in English and Social Science and that he had lived in Paducah for 5½ years and that as a part of his studies and work he made a study of the moral and social behavior of people. [R. 68.]

Dr. Schlafer testified that he felt he knew the contemporary community standards of the community. He stated that in his opinion both High Heels and Spree were "both obscene and indecent. They appeal basically to the baser nature of man and they cheapen womanhood. They are detrimental from the standpoint of degrading something that God intended to be holy and sacred and beautiful in the right context." He stated that a number of studies have been made through Congress and the state government regarding the effects of obscene literature on people. [R. 68-70.]

On cross-examination by the defense attorney Dr. Schlafer testified that Cavalier, Dude and Playboy were not similar to High Heels and Spree and that there was "quite a contrast". [R. 71.] He saw a difference in the reading material, particularly Spree. [R. 72.] He stated that on every page there was something offensive to the moral man or woman. [R. 75.] He stated that the descriptions and stories very definitely are worse than the 19th chapter of Genesis (Lot and his two daughters) and that "in the Scriptures this act is not glorified". [R. 76.]

Albert Jones testified that he was the Commonwealth attorney of the Second Judicial District and that pre-

vious to that he had been a Special Agent for the FBI for two years. He stated that he knew of studies made of obscene literature in relation to the behavior of man.

On cross-examination by the defense attorney he stated that he was assisting in the case and that as Commonwealth attorney it was part of his duties.

Following the court's instructions to the jury [R. 109] and arguments of counsel [R. 78-92], the jury returned a verdict of guilty on February 28, 1964 and assessed a fine of $250. [R. 94.] On March 5, 1964, the petitioner filed motions to set aside the jury verdict and for a new trial. [R. 111.] On March 9 the court overruled both motions. [R. 114.] On January 22, 1965, the Court of Appeals of Kentucky in a *per curiam* opinion in *Austin v. Commonwealth of Kentucky,* 386 S.W. 2d 270, with Chief Justice Moremen dissenting, overruled petitioner's motion for an appeal, noting "We find no error in the trial. . . ." A motion to reconsider was also overruled by the Court of Appeals.

Summary.

I.

The construction given by the Kentucky courts to the State statute, *i.e.,* that the scienter requirement is "knowledge of the contents and character" of the magazines is completely non-reviewable by this Court.

Petitioner's argument that this Court's decision in *Smith v. California* imposes a specific intent requirement misreads *Smith* and disregards the subsequent expressions in *Mishkin v. New York.*

To insure cohesiveness, a frame of reference must be drawn — that of the defendant's state of mind. The

state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact has five classes or degrees of "subjective" knowledge. Three are generally regarded as subjective knowledge and the last two, "objective" knowledge.

The scienter requirement came into the law in the *Smith* decision. In establishing a "mental element" it also left a void by not describing more completely what that requirement was. The Court's language, however, properly interpreted, indicated that subjective knowledge was not a requirement. This Court's reference to the California scienter requirement in *California v. Alberts*, the common law precedents and the Model Penal Code (1957 draft) approach seemed to indicate that "awareness of the contents and character" was the test, with an objective factor somewhere between ordinary negligence and recklessness.

The *Smith* decision left three areas undecided: (1) whether honest mistake need be a defense; (2) whether a *prima facie* presumption might shift the burden of going forward with the evidence, and (3) whether a *prima facie* presumption might shift the burden of proof.

The *Mishkin* case established "recklessness" as an acceptable scienter requirement, drawing a comparison between the Model Penal Code scienter version and the New York statute. That case clearly established the principle that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof.

Reading the New York statute in the light of the two *Finkelstein* cases, the test is "awareness of the contents plus awareness of the character of the material."

Taken together they spell out calculated, not innocent purveyance of filth.

The trial judge in the McCracken County Circuit Court gave essentially the same test to the jury to guide its deliberations. The standards therefore were correct.

II.

In 1896 in the *Rosen* case, the United States Supreme Court gave an instruction which made everyone using the mails chargeable with knowledge of decency, purity, obscenity, etc. In 1957, the *Roth* court cited this proposition as an answer to a claim that the obscenity statutes do not provide "reasonably ascertainable standards of guilt." It would appear that under *Rosen*, proof of the obscenity of the subject matter and proof of knowledge of the contents would function like a *prima facie* presumption, to show knowledge of the obscenity.

The *prima facie* presumption of the Model Penal Code arises from proof of possession, etc. This requires an additional inference, that a person knows the contents of what he possesses for sale, to compare with the *prima facie* presumption described by the *Rosen* decision. There is authority that the additional inference is reasonable and that the *prima facie* presumption in the Model Penal Code (1962) meets the test of constitutional due process, *i.e.*, a rational connection existing between the facts proved (possession for sale and that the subject matter is obscene) and the additional fact presumed (that the defendant was aware the subject matter was obscene).

The *prima facie* presumption of the Kentucky statute is the same as the Model Penal Code and the same rational relationship exists here also.

The Commonwealth in presenting their case in chief, did not resort to the statutory presumption; nor was reference made to it during the arguments to the jury. An examination of the people's evidence presented during their case in chief reveals a case supported by sufficient evidence without resort to the presumption.

The trial judge in his instructions made no reference to the presumption. In fact, at no place in the transcript is there any reference to it.

This Court should not inquire into the constitutionality of a statute (the presumption) in the abstract. Even were the presumption to be held unconstitutional, the same would not affect the conviction in this case which was effected solely under another section.

III.

The cases cited by petitioner wherein this Court has engrafted a stricter *"mens rea"* requirement into statutes which affect conduct in the free speech area, did not have the strong countervaling force present which exists here, *i.e.*, the public interest in rigid enforcement of the obscenity laws.

Petitioner's claim that the scienter standards must be "subjective" is in opposition to the people's claim that they must be "objective", if the social evil is to be controlled. The controversy thus framed, places in the balance two opposing forces; free speech and the police power. In weighing the balance, *amicus* underscores the relative right of the government to regulate matters relating to sexual morality.

The public interest in good public morality relating to the sex function is paramount.

The public policy of this Court has always championed the obscenity laws.

Rosen v. U.S. holds that "subjective" knowledge of obscenity is irrelevant and "good faith belief" is no defense. This Court in the *Roth* case considered the *Rosen* case valid precedent. Recently the Sixth Circuit Court of Appeals has relied on it in affirming *United States v. West Coast News Co., et al.*

The implications of *Rosen* being overruled are frightening. The result would be to turn past confusion into a weapon of destruction against the people's cause.

The "good faith belief" instruction requested by petitioner was erroneous for failing to instruct the jury that reasonable grounds for the belief were also required.

The evidence which was excluded by the trial court was inadmissible on the grounds offered.

This Court should consider the following standards and criteria in reviewing the state court judgment: Petitioner was convicted in a jury trial under procedures which accord the maximum safeguards to personal liberty. The Seventh Amendment is operative here, according special importance to jury determinations.

This Court should disregard the *prima facie* presumption provision. It was not involved in the case and has since been repealed along with the other obscenity sections which were replaced during the 1966 Session by a new obscenity statute. The presumption provision has no future application.

Assuming this Court sustains the scienter provision, the remaining question relates to the standards and criteria to be followed in applying the law to the facts. The Court has a proper role and the jury has a proper role. This Court's inquiry should be as to whether a jury issue is presented from the facts. If it is, then a "sufficient evidence" standard should be applied in accordance with Justice Warren's views in *Jacobellis*.

The petitioner is no neophyte. His experience qualifies him as an expert. The reputation of Spree, All State News, etc. are well known. His reckless conduct is apparent.

The Independent Distributors could do much to assist the communities in getting rid of obscene materials, but they prefer non-involvement. Petitioner wanted the name of each issue which was objectionable, so that he might take action on one magazine only.

Petitioner was not taken by surprise. The community action throughout the nation is a matter of wide knowledge. He chose to "see no evil, hear no evil, speak no evil".

In the seven years since the *Smith* case, state and federal appellate courts have found no difficulty in affirming convictions based on objective knowledge and circumstantial evidence of less weight than in this case.

ARGUMENT.

I.

THE PEOPLE'S BURDEN OF PROOF ON "SCIENTER" DESCRIBED IN SECTION 436.100 OF THE KENTUCKY REVISED STATUTES AND CONSTRUED BY THE COURTS OF THE COMMONWEALTH OF KENTUCKY SATISFIES THE CONSTITUTIONAL REQUIREMENT ESTABLISHED IN SMITH V. CALIFORNIA.

A. The Construction of Section 436.100 of the Kentucky Revised Statutes Adopted by the Courts of the Commonwealth of Kentucky, i.e., That the Scienter Requirement Is "Knowledge of the Contents and Character" Is Binding on This Court.

Subsections (2) and (4) of Section 436.100 of the Kentucky Revised Statutes read in part as follows:

> (2) Any person who, with knowledge of the *contents or character,* sells, lends, etc. . . . any obscene book, magazine, etc. . . . shall be fined. . . . (Our emphasis.)
>
> (4) The sale, loan, etc. . . . of any book, magazine, etc. . . . found to be obscene, shall be *prima facie* evidence that the seller . . . had knowledge of the obscene character of the printed matter, picture. . . .

In construing the above statute, trial judge C. Warren Eaton of the McCracken Circuit Court instructed the jury as follows in regard to the scienter issue:

> "If the jury believes from the evidence in this case beyond a reasonable doubt that the defendant Wil-

liam L. Austin *had knowledge of the contents and the character of said magazines* . . . you will find the defendant guilty as charged. . . ." (Our emphasis.)

It should be observed that, in interpreting the phrase "contents or character" as employed in subsection (2), the trial judge must have taken note of the statutory language used in subsection (4) and concluded that the phrase meant *contents and character.* The court's interpretation was little more than an application of the general rule that laws *pari materia* must be construed with reference to each other.

The Commonwealth of Kentucky Court of Appeals put its stamp of approval upon this construction of the statute when in *William L. Austin v. Commonwealth of Kentucky,* ..... Ky. ....., 386 S.W. 2d 270, decided January 22, 1965, it denied petitioner's application for an appeal and held, "We find no error in the trial. . . ."

The views of the State court below, in respect to the above construction of the Kentucky statute, *i.e.,* that the scienter requirement is "knowledge of the contents and character" are completely non-reviewable by this Court. Where the validity of a statute has been sustained in the face of federal objections, the Supreme Court *must* accept the State Court's construction and proceed to test the validity on that basis. *General Trust Company v. Blodgett,* 287 U.S. 509, 513; *Kingsley Pictures Corporation v. Regents,* 360 U.S. 684, 688, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (June 29, 1959).

B. Proof of Specific Intent and "Subjective" Knowledge Is Not Constitutionally Compelled by Smith v. California. Mishkin v. New York Instructs Us That "Objective" Knowledge of the Content and Character of the Materials, Being Synonymous With Reckless Conduct, Meets the Smith Requirements.

Petitioner argues in Point I of his brief that this Court's decision in *Smith v. California* imposes a constitutional requirement that the people must "plead . . . that the accused knew that the material involved was obscene and, with such guilty knowledge, published, distributed or sold the material *with the specific intent* to appeal to a prurient interest". (Pet. Br. pp. 12, 14, 20-24, 30; our emphasis.) Such an interpretation misreads *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959), and totally disregards the subsequent expressions of this Court in *Mishkin v. New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (March 21, 1966). This Court has already established that "subjective" knowledge is not the prosecutor's burden of proof under the constitutional limitation.

It is important at the outset of these arguments that a frame of reference be drawn to insure cohesiveness. The proper frame of reference is the one under investigation — the defendant's state of mind.

1. An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

The prosecution's concern is the state of mind that must be proved as to any defendant, as expressed in the scienter provisions of the Penal Statute.

Consider the state of mind spectrum which may exist "subjectively" in any person who has sold a book which

is obscene as a matter of fact. Degrees of "subjective" knowledge are listed in chronological order.

(1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);

(2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowledge);

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact — criminal negligence);

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact — or only slight negligence).

Addressing himself to the above range in attitudes, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L. Rev. 905 (1939); Perkins on Criminal Law, p. 684.) Only in the most theoretical discussions would it be questioned that one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds, unless (1) the particular offense does not require *mens rea* for conviction, *i.e.*, traffic offense, or (2) the deeds even under the circumstances as they were

reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age.

Class (2) is regarded as "knowledge" as that word is used in regard to *mens rea.* The distinction between class 2 and class 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Class (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard, and is treated as having "knowledge" of the facts as they are ultimately discovered to be.

Awareness of fault is the characteristic which distinguishes class (3) from class (4). In the latter—bona fide belief contrary to fact, not based upon reasonable grounds, there is no awareness of fault — the belief is entertained in good faith but was acquired as a result of gross negligence.

Classes (1), (2) and (3) are distinguishable from classes (4) and (5) in that in the latter, the subjective belief is actually contrary to the fact, one results from gross negligence and the other from slight negligence or no negligence.

Professor Perkins diagrams the meaning of "knowledge" as a *mens rea* requirement as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

Want of "knowledge"

(4) Bona-fide belief contrary to fact resulting from criminal negligence.

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (or resulting from only slight negligence).

2. The Scope of the "Mental Element" Established in Smith v. Calif.

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith v. California* (*supra*).

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. Smith was charged only with a violation of the City Ordinance. The difference in the two statutes is explained by Judge Swain in his dissenting opinion in *People v. Smith,* 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958), which affirmed Smith's conviction at page 641:

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra,* 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.' Under the city ordinance the prosecution does not have to prove scienter; under the Penal Code section, it does . . ." (Our emphasis.)

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and

Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the *Smith* case. If the *Smith* judgment were reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? This Court in its opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to *Amicus* seemed to be rather clear guidelines, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents or falsely deny reason to suspect their obscenity*. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind, See Pound, The Role of the Will in Law,' 68 Harvard Law Review 1, cf. *American Communications Association v. Douds*, 339 U. S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The *Smith* Court at page 152, footnote 9, also pointed to the scienter requirement of the California Obscenity Statute considered in *California v. Alberts (Roth-Alberts)*, 354 U.S. 495, 1 L. Ed. 2d 1498, 77 S. Ct. 1314 (1957) and sustained in that case:

> "The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and *was of course sustained by us in Roth v. U.S.*" (Our emphasis.)

An examination of the scienter burden imposed by the California statute and approved by the *Roth-Alberts* court should have silenced all argument on whether the constitutional requirement included a specific intent and proof of "subjective" knowledge, *i.e.*, classes 1, 2 and 3, *supra*. The judicial construction given by the California courts to the California statute which was before this Court in the *Smith* case appears in *California v. Smith*, 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958):

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Under the principle that this Court must accept a state court's construction of a statute and proceed to test its validity on that basis, *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the test imposed therein. The prosecutor's burden under *Calif. v. Alberts* was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials." There is little doubt that "subjective" knowledge is *not* a requirement under this California test. "Objective" knowledge is sufficient — the measuring rod was the reasonable and prudent person, not the defendant. A reasonable classification of the prosecutor's burden in the *Alberts* case would certainly include class (4) *supra*.

The Smith Court also pointed out at footnote 9 certain differences between the common law scienter approach and that proposed by the drafters of the American Law Institute, Model Penal Code in their 1957 draft.

> "The common law prosecutions for the dissemination of obscene matters strictly adhered to the requirement of scienter . . . Cf. . . . American Law Institute, Model Penal Code, Section 207.10 (7), tentative draft No. 6, May 1957, and Comments, pages 49-51."

The Comments to the 1957 Model Penal Code, referred to by the Smith Court, point out at page 49 that under the common law precedents, "subjective" knowledge was not the prosecutor's burden in this area of the law.

"Under prevailing obscenity laws, the prosecution must prove that defendant knew or, *at least was reckless* as to the presence of objectionable material in a book or other publication disseminated by him. *It does not have to prove that defendant was aware of the evil tendency of the material. . . .*" (Our emphasis.)

Nor was "honest mistake" a defense, at page 49:

"Our recommendation may seem hard on the defendant unless one bears in mind that prevailing law is even rougher, *absolutely precluding any defense based upon the defendant's misappraisal of the tendencies of the material. . . .*" (Our emphasis.)

On the other hand, the American Law Institute, Model Penal Code (1957 draft) was designed to change the prevailing law on "scienter" in the obscenity area, by establishing "honest mistake" as a defense. The following comment appears at page 51:

"Nevertheless we believe that a possibility of acquittal for honest ignorance should be preserved. In the great bulk of cases brought to prosecution the unequivocally obscene character of the material will guarantee conviction against any contention of subjective innocence of the actor. On the other hand, in those cases admitting of a respectable argument that the appeal of the material is predominantly artistic or scientific, retention of this mens rea defense will help to preserve a proper conservatism in law enforcement effort in this field."

To accomplish this objective certain presumptions of "scienter" were established, arising out of proof of possession, etc., which in turn the defendant was permitted to rebut by proving honest mistake, etc. Two alternates were proposed.

One proposal suggested shifting the burden of proof from the People to the defendant. This is accomplished by creating a rebuttable presumption of "scienter" in the defendant's act of dissemination, etc., and placing the burden on the defendant to overcome the presumption by a "preponderance of evidence" to the contrary. An alternative scheme in the 1957 draft suggested the same rebuttable presumption but left with the People the burden of proving "scienter" beyond a reasonable doubt. The 1957 draft also established "knowingly and recklessly" as the prosecutor's burden of proof. Section 2.02(2)(c) defines "recklessly" as:

> (c) *Recklessly.* A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. . . ."

Ignorance or mistake as to a matter of fact or law was made a defense by Section 2.04 of the Model Penal Code if the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense.

A reasonable classification of the prosecutor's burden under the proposals contained in the 1957 draft of the Model Penal Code would certainly include class (4) *supra*, the definition of "recklessly" being the equivalent of criminal negligence.

The Smith Court refused to comment on the American Law Institute's Model Penal Code proposals. In its opinion at page 212 the Court specifically left three areas undecided:

(1) Whether honest mistake need be an excuse, (2) whether a *prima facie* presumption might shift the burden of going forward with the evidence, and (3) whether a *prima facie* presumption might shift the burden of proof,

> "We need not and most definitely do not pass today on what sort of mental element is requisite for a constitutionality permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether the contents in fact constitutes obscenity *need be an excuse;* whether there might be circumstances under which the State constitutionally might require that a bookseller investigate farther, or might put on him the burden of explaining why he did not, and what such explanation might be. . . ." (Our emphasis.)

The specific designation of three areas of reservations would seem to indicate that all other matters were meant to be resolved by that opinion.

It thus appears that, after Smith, specific intent and "subjective" knowledge was definitely not a limiting requirement. The Court's approval of the language "in proving his awareness of its contents", its apparent ap-

proval of the scienter provision as construed by the California courts in *California v. Alberts, supra,* which employed the "reasonable and prudent man" test, and the Court's reference to the common law precedents and the 1957 draft of the American Law Institute Model Penal Code, which accepted "recklessness" as an acceptable position of reference, were strong support for the proposition that the prosecutor did not have the burden of proving "subjective" knowledge on the part of the defendant as a constitutional limitation. This proposition was recently confirmed by this Court's decision in *Mishkin v. New York, supra,* approving the burden of proof established in the New York statute, as interpreted by the New York Court of Appeals.

3. Mishkin v. N.Y. Holds Awareness of Content and Character of Material, Being Synonymous With Reckless, Meets Smith Requirements.

Mishkin's argument before this Court had two prongs: (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and (2) that the people's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

> "There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."
>
> "It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."

> ". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden . . ."

This was also the same argument that had been made and rejected in another retailer case *New York v. Finkelstein,* 11 N. Y. 2d 300, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted" the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

In replying to Mishkin's contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases this Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material", the other of "knowledge of the contents."

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner *aware of the character of the material* they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised." voiced in the first *Finkelstein* case. The

New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance. In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), 1962 and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which were described as expressing a "similar" requirement. Section 215.4 (2) of the Model Penal Code (1962) cited by Justice Brennan provides that: ". . . a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," and establishes a rebuttable presumption from the fact of possession for sale of obscene matter:

> "A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly. . . ."

Model Penal Code, Section 251.4(2) having been cited as having a scienter requirement "similar" to the New York standard which it approved, it therefore follows that the Court in *Mishkin* also approved the "knowingly or recklessly" requirement of the Model Penal Code as fulfilling the constitutional requirements. Whereas it appeared from other language in *Smith* that this would follow, *supra*, the *Mishkin* decision erased all doubt in this regard.

A person would be guilty under the "recklessly" standard of the Model Penal Code not only where he purposely avoided making a judgment on the material (class 3, *supra*), which Professor Perkins indicates is customarily regarded as "knowledge", but also where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief—"objective" knowledge (class 4, *supra*). It therefore

clearly is the law that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof.

C. The Kentucky Standard, "Knowledge of the Contents and Character" of the Magazines Satisfies the Constitutional Requirement, Established in the Smith Case and Clarified by Mishkin, Being the Equivalent of the Test Employed by the New York Courts in the Latter Case.

This Court, in upholding the scienter provision of New York Penal Law, Section 1141 in the *Mishkin* case, relied upon the interpretation given that section by the New York Court of Appeals in *People v. Finkelstein*, 9 N.Y. 2d 342, 344, 348, 174 N.E. 2d 470, 472 (1961). There the Court of Appeals "interpreted" the statute to require the "vital element of scienter" which it interpreted as "awareness of the contents," at page 471:

> "In *Smith v. People of State of California* . . . the United States Supreme Court declared unconstitutional a Los Angeles City ordinance which proscribed, and was construed to impose strict liability for mere possession of obscene prints, regardless of the offender's *awareness of the contents.* The New York proscription, on the other hand, neither expressly, nor by our construction here, dispenses with this *vital element of scienter,* and therefore, in no way impinges upon the traditional freedom guarantees of speech and press (*Roth v. U. S.*) . . ." (Our emphasis.)

Speaking further on the people's burden of proof which the Court had read into the statute in its decision, the Court there said at page 471:

> "A reading of the statute as a whole clearly indicates that only those who are *in some manner aware of the character of the material* they attempt to distribute should be punished. *It is not innocent but calculated purveyance of filth* which is exorcised . . ." (Our emphasis.)

Reading the entire language of that Court together, it is apparent that the New York test is "awareness of the contents plus awareness of the character of the material." Taken together the language spells out "not innocence but calculated purveyance of filth", for awareness of "character" implies an awareness of the distinguishing characteristic of the material, "Character" being defined in Webster's Collegiate Dictionary, Fifth Edition, as:

> 1. A sign or token placed upon an object as an indication of some special fact, as ownership or origin, a mark, brand or stamp. 2. Hence (a) A graphic symbol of any sort; . . . 3. An attribute, quality, or property; esp., a distinguishing attribute.

Circuit Judge C. Warren Eaton of the McCracken Circuit Court in his instructions on scienter, gave essentially the same test to the jury below. It follows that the standards employed to guide the Kentucky jury in its deliberations were correct.

II.

THE PRIMA FACIE PRESUMPTION OF SECTION 436.100(4) OF THE KENTUCKY REVISED STATUTES AS CONSTRUED AND APPLIED BY THE COURTS OF THE COMMONWEALTH OF KENTUCKY DID NOT DEPRIVE PETITIONER OF ANY OF HIS CONSTITUTIONAL RIGHTS.

A. The Prima Facie Presumption Is Rationable and Reasonable.

In 1896 the United States Supreme Court said in *Rosen v. U.S.*, 161 U.S. 29, 42:

> "Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious . . .".

This modern court in 1957 in its landmark decision in *Roth v. U.S.*, 354 U.S. 476, 491 considered the above language of the *Rosen* case to be sufficiently "alive" to answer the petitioners' arguments in that case, that the obscenity statutes do not provide "reasonably ascertainable standards of guilt", citing the same in footnote 28 as an answer to that proposition. Considering the context in which the citation was used, it would appear as though the *Roth* Court was saying that a person who has knowledge of the contents is *presumed to know* and is *chargeable with knowledge of* what the community standards are, and what a jury will declare obscene.

Independent of how severely a state legislature might choose to define the people's burden of proof on scienter in any state obscenity statute, and independent of whether "honest mistake" need be an excuse, proof by the

People (1) that a defendant had knowledge of the contents of the materials and (2) that the material was obscene, should, at the very least, under the *Rosen* rule, establish a *prima facie* case against the defendant, functioning like a *prima facie* presumption.

Section 251.4(2) of the 1962 Model Penal Code provides in part:

> "(2) Offenses. Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he knowingly or recklessly: (a) sells, etc., any obscene writing, etc. . . . *A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly . . .*". (Our emphasis.)

The *prima facie* presumption voiced in the 1962 draft arises from proof of possession or dissemination of obscene material in the course of business whereas, under our analysis of *Rosen*, the presumption there would arise from proof of "knowledge of the contents of obscene materials". It thus appears that the 1962 draft of the Model Penal Code follows the basic principle expressed in the *Rosen* case, except that an additional inference is employed *i.e.*, that a person knows the contents of what he possesses for sale. Also, the possibility of acquittal for honest mistake is permitted, as a matter of defense in the Model Penal Code version.

Although it is fundamental to the criminal law that a defendant is presumed to be innocent until the contrary is proved, that the burden of proving the contrary rests with the People all during the trial, and that in case of a reasonable doubt the defendant is entitled to acquittal,

such principles are subject to a number of practical exceptions.

One of the exceptions is that the burden of going forward with the evidence may be shifted to the defendant by a presumption which meets the test of constitutional due process: *i.e.*, where there is a rational connection between the facts proved (as in *Rosen*, that the subject matter is obscene and that the defendant had knowledge of the contents of the subject matter) and the additional facts presumed (that the defendant was aware the subject matter was obscene). See *California Evidence*, Witkin, at page 74.

The additional inference, beyond the *Rosen* reasoning, required in the 1962 Model Penal Code *i.e.*, that a person knows the contents of what he possesses for sale, does not appear unreasonable. See *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 where the Nebraska Supreme Court said at page 863 in a criminal case involving the possession of nudist magazines for sale:

> "*A seller of magazines and phonograph records is ordinarily presumed to know what he is offering for sale,* although it is not universally so. The operator of a book store, for instance, would not be presumed to know of every iolated obscene statement in the hundreds of books that he has for sale. But in a situation, as here, where the covers of the magazines, front and back, are occupied with pictures of nude women in various poses, it can hardly be said that the jury could not infer knowledge of their contents by the defendant and an intent to sell obscene materials . . .". (Our emphasis.)

For other courts which have seen the wisdom in either an inference or a rebuttable presumption in such cases, see *Minnesota v. Oman,* 261 Minn. 10, 22, 110 N.W. 2d 514, 523 (Sept. 1, 1961); *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (Nov. 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (Dec. 13, 1963); *State v. Miller,* 145 W. Va. 59, 112 S.E. 2d 472, 478.

The facts of the *Finkelstein* case lead one to believe that the Court of Appeals was thinking somewhat along the lines of the drafters of the Model Penal Code when it sent the case back for retrial so that the defendant could come forward with testimony or proof to explain the "presence of salacious literature in their possession." At page 472:

> "Although the people have the burden of proof defendants may have an opportunity to testify or offer proof, if they desire, in regard to the presence of salacious literature in their possession for sale. . . ."

The *prima facie* presumption under Section 436.100(4) of the Kentucky Revised Statutes arises upon proof by the people (1) that a *person sold the material* and (2) that the material was obscene. The same rational connection exists here, between the facts proved and the additional fact presumed, as in the 1962 Model Penal Code version, *Jungclaus* and the other cases which have recognized this relationship independent of statute.

B. Petitioner Has No Standing to Attack the Application and Provisions of Section 436.100(4) Which Are Not Involved in This Appeal.

The long-established rule that one may not invoke the constitutional rights of another has traditionally been held to imply, in the case of a statute whose application to A would be within the legislative competence but whose application to B would not, that if A is convicted for violating the statute, he may not challenge his conviction on the grounds that B, who is also included within the statutory terms, would be immune from conviction.

The people in presenting what they regarded as a *prima facie* case did not resort to the statutory presumption. They made no reference to it during their arguments to the jury [R. 85-92] and an examination of the people's evidence presented during their case in chief (Statement of Facts, *supra*), reveals a case supported by sufficient evidence and needing no presumption to go to the jury.

The trial judge in his instructions to the jury, prior to their deliberation, made no reference to the provision.

In fact, at no place in the transcript is there any reference to its provisions. It is in the above context that this Court is being asked to rule upon the constitutionality of this legislation.

This Court will not, and should not, inquire into the constitutionality of a statute in the abstract. *United States v. Raines*, 362 U.S. 17, 21 (1960).[1] Even were

[1]"This Court, as in the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudicate the legal rights of liti-

this Court to consider and hold Section 436.100(4) unconstitutional, it would still not affect the conviction in this case, which was effected solely under Section 436.100(2).

III.

THE COURT'S REFUSAL TO INSTRUCT THE JURY THAT THEY MUST ACQUIT THE PETITIONER IF THEY FOUND HE HAD A "GOOD FAITH BELIEF" WAS NOT AN ABRIDGMENT OF HIS CONSTITUTIONAL RIGHTS.

A. The Excuse of "Good Faith Belief" Is Not, and Should Not Be Made, a Constitutional Requirement of the Obscenity Crime.

In his brief, Petitioner cites numerous instances wherein this Court has, as a matter of constitutional doctrine, engrafted onto state and federal criminal statutes and civil actions which affect conduct in the free speech area, a stricter "mens rea" requirement than that which was chosen by the legislative bodies and approved by lower state and federal courts. In none of these cases however, did the countervailing governmental or private force in play, approach the importance of the public interest, in ascertaining that the obscenity

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gants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' Liverpool, New York and Philadelphia S.S. Co. v. Commissioners of Immigration, 113 U. S. 33, 39. *Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional. U. S. v. Wurzbach, 280 U. S. 396." United States v. Raines,* 362 U. S. 17, 21 (1960). (Our emphasis.)

laws are rigidly enforced. The right of a public official to collect damages for a defamatory falsehood, or the right of government to punish individuals for defamatory statements regarding public officials is not so weighty when balanced against the type of speech being impaired (political) by the proposed controls. On the other hand, the right of the government to maintain proper standards of sexual morality in the community carries overriding importance when balanced against the type of speech being impaired (sexual). *Cf.*, Justice Harlan, dissenting in *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 821, 84 S. Ct. 1723.

Petitioner contends that the "mens rea" requirement must reflect a "subjective" standard so that he might have the opportunity to show "good faith belief" in defense, else he will suffer impairment of personal rights of freedom of speech and press. The people contend otherwise, in the belief that "objective" standards are required by the police power of the state, if the social evil of obscenity is to be controlled.

The controversy thus framed, places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, we have the defendant claiming supremacy of an individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments of the Federal Constitution. On the other hand, we have the people laying claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments to the Federal Constitution.

In 1957 this same controversy faced the United States Supreme Court in *Roth-Alberts*. There this Court drew the balance between the two conflicting powers, which it expressed in terms of the *Roth* test. The same type of controversy is again before the Court, this time in relation to the "mens rea" requirement.

Because the determination involves fundamentally a balancing of the two powers, amicus wishes to underscore the relative importance of the interest which supports the right of government to apply an "objective" standard.

1. The Paramount Right of Government to Regulate Matters Relating to Sexual Morality.

In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wall. 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what is offensive to *public morality*, the United States Supreme Court said, in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are

permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government.* It belongs to that department to exert what are known as police powers of the state, *and to determine what measures are appropriate or needful for the protection of the public morals,* the public health, or the public safety. . . ." (Our emphasis.)

The public morality that we are concerned with here are standards which relate to the sex function. Such standards encompass not only the sexual parts as they are exhibited in public displays, but also as they may be permitted by the community to become proper subjects for public discussion.

That such standards do, in fact, exist and are enforced, can be seen from the fact that government uniformly and without serious opposition enforces laws which require persons to conceal the sex organ and private parts of the body while in public. It can hardly be argued that a person might appear naked in the court room under the guise that he or she were "speaking out" on behalf of nudism, nor could that person parade naked elsewhere in the community. His or her subjective intent may be wholesome, but the community can properly equate such conduct with lewdness, because of the prevailing sentiment in the community concerning standards of decent exposure of the person. Even Justice Douglas, was willing to concede in *Roth (supra)* at page 512, that:

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

Similarly, representations and discussions of sex and its function may be regulated insofar as they do offend public policy as expressed through the obscenity laws.

It is to maintain the sexual standards, which are acknowledged by the great majority of people in our society, that government has, under the police power, enacted laws on indecent exposure and obscenity. Such right is an inherent part of our self-government, having been passed down to us, in our Constitution, from the Common Law Courts of England, which recorded their existence over three centuries ago.

LeRoy v. Sedley, 1 Sid. 168, 82 Eng. Reprint 1036 (1663);

4 Bl. Comm. 64;

Rex v. Curl (1727) 2 Strange 788;

Commonwealth v. Sharpless, 2 S and R. 91, 7 Am. Dec. 632 (1815);

Roth-Alberts, supra.

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows in "Morals Offenses and the Model Penal Code" appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginzburg v. U.S.,* 16 L. Ed. 2d 31, at page 38, fn 12; page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.,* 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

". . . the great majority of people believe that the morals of 'bad' people do, at least in the long

run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstratably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism.",

and at page 672:

"If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues at page 681:

"But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

In sum, the case for the governmental action taken by the state was stated by Justice Harlan in his concurring opinion in *Roth-Alberts (supra)*, at page 502:

> "The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Amicus believes that the history of our government refutes petitioner's claim to a supremacy of the personal right of an individual to have a "subjective" standard as a measuring gauge for the "mens rea" in the obscenity crime.

2. The Public Policy of This Court Has Always Championed the Obscenity Laws.

The public policy of this Court has always championed the obscenity laws and the suppression of obscenity. See *Rosen v. U.S.*, 161 U.S. 606 (1896), decided by the U.S. Supreme Court at the turn of the century. Rosen attempted to escape a jury conviction on an obscenity charge on a technicality. He sought his freedom on appeal, arguing that, because the People had not described the obscenity in their complaint, he had not been properly informed of the nature of the crime. United States Supreme Court Justice John Marshall Harlan, grandfather of the present United States Supreme Court Justice John Marshall Harlan, rejected this plea out of hand and, in invoking the unanimous rule of the courts at that time, drew from the language of

an earlier Massachusetts Supreme Court decision at page 608:

> "It can never be required that an obscene book and picture should be displayed upon the records of the court. . . . This would be to require that the People itself should give permanency and notoriety to indecency in order to punish it."

This favored policy is not difficult of understanding. Central to our heritage is the expectation that our Courts should strive to preserve our heritage and should not give scandal by tolerating anything which tends to debase public morals.

Less than 35 years ago this Court underscored this same "favored position" of the obscenity laws when, in *Near v. Minnesota,* 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931) the members of that Court made it clear that immunity from previous restraint did not extend to obscene publications.

Eleven years later, not one member of the 1942 Court entertained any doubt that the existence of obscenity was contrary to the people's abiding interest in good public morals. Neither the prevention of publication (previous restraint) nor criminal punishment for dissemination raised any constitutional problems in their view. In *Chaplinski v. New Hampshire,* 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) that Court said at page 571:

> ". . . There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene. . . . It has been well observed that such utterances are no essential part of any exposi-

> tion of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."

Ten years later, the majority of the members of the 1952 Court in *Beauharnais v. Illinois,* 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952) agreed with the *Chaplinski Court,* adding:

> "Certainly no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances (clear and present danger) . . ."

When, five years later, in *Roth v. U.S.* and *Alberts v. California,* 354 U.S. 476, 77 S. Ct. 1314, 1 L. Ed. 2d 1498 (June 24, 1957), this present Court was faced with a broadside attack on the statutes guarding public decency, seven members of this modern court stood firm and enunciated a solid distaste for obscenity. *Rosen v. U.S. (supra), Near v. Minnesota (supra), Chaplinski v. New Hampshire (supra),* and *Beauharnais v. Illinois (supra)* were all confirmed. The language of *Rosen* was cited with approval. Everyone was charged with notice of what must be deemed obscene. The *Roth-Alberts* majority opinion placed emphasis on the language of *Chaplinski* noted above. Obscene utterances were of such slight social value as a step to truth that any benefit to be derived from them was clearly outweighed by the social interest in order and morality. The above language of the *Beauharnais* Court was cited with approval. No one could contend that obscene speech could be punished only upon a showing of a clear and present danger.

More recently, the expression of this Court in *Ginzburg v. U.S., supra,* condemning the "sordid business of pandering," confirmed the more ancient precedents and helped to correct a contrary impression felt by many, arising out of this Court's policy treatment in "prior restraint" cases.

3. Rosen v. U.S., Is Strong Precedent Against Such a Proppsition.

In 1896, the same attack as petitioner makes here was made against the "scienter" provision of the federal postal statute in *Rosen v. U.S.,* 161 U.S. 29. There the Court, based upon its historic opposition to obscenity, held "subjective" knowledge of obscenity irrelevant and "good faith belief" no defense.

In *Rosen* the defendant was convicted under a federal statute which made it a misdemeanor to knowingly deposit obscene matter in the mail. The trial court *had refused to give a jury instruction which provided that the jury must acquit if it entertained a reasonable doubt whether the defendant knew that the matter was obscene.* On appeal, the U.S. Supreme Court said at page 610:

> "The statute is not to be so interpreted. The inquiry under the statute is whether the paper charged to have been obscene, lewd, and lascivious was in fact of that character, and if it was of that character and was deposited in the mail by one who knew or had notice, at the time, of its contents, the offense is complete, although the defendant himself did not regard the paper as one that the statute forbade to be carried in the mails. *Congress did not intend that the questions as to the character of the paper should depend upon the opinion or be-*

lief of the person who, with knowledge or notice of its contents, assumed the responsibility of putting it in the mails of the United States. The evils that Congress sought to remedy would continue and increase in volume if the belief of the accused as to what was obscene, lewd, and lascivious was recognized as the test for determining whether the statute had been violated. Everyone who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life and what must be deemed obscene, lewd and lascivious." (Our emphasis.)

This modern Court considered the *Rosen* case controlling precedent in *Roth-Alberts, supra,* footnote 28 as to the attack denying "reasonably ascertainable standards of guilt" in the obscenity statute. The Sixth Circuit Court of Appeals thought it controlling in *United States v. West Coast News Co. et. al.,* 357 F. 2d 855, 862 (Mar. 22, 1966).

Somewhat the same arguments, as petitioner makes here, regarding the burden placed upon the retailer etc. by *Rosen,* were made by the appellant in *Tyomies Publishing Co. v. United States,* 211 Fed. 385 (Mar. 3, 1914). In answer to the argument that this puts too great a burden of prescience on defendants, the Tyomies Court cited the language of Justice Holmes in *Nash v. United States,* 229 U.S. 373, 377:

"The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine, or a short imprisonment, as here, he

may incur the penalty of death. An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it by common experience in the circumstances known to the actor. The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw . . ."

4. The Implications of Rosen Being Overruled Are Frightening.

In the years following the *Roth* decision and continuing on up to the cases decided during the October, 1965 Term, considerable confusion arose in the obscenity area because of a misunderstanding regarding the meaning of what this Court was doing in its decisions in previous restraint cases. The rumor was widespread that this Court was tolerating obscenity, when in reality it was developing harsh procedural rules where previous restraint controls were used. The prosecutor's bleat was that he had no remedy, and that it was useless to prosecute. No one noticed the criminal convictions which this Court left undisturbed on appeal. Out of this confusion arose the hard-core pornography interpretation of *Roth-Alberts,* dismissals without trial of several major cases against the prime movers in the pandering trade and serious impairment of obscenity controls.

The *Ginzburg* and *Mishkin* decisions handed down during the October Term, 1965 have provided the signal which was needed to release the prosecutive forces in a renewed effort to slow down the momentum which has been building up in the obscenity trade since 1957. Were

this Court now to require "subjective" knowledge and the excuse of a "good faith belief", as a constitutional requirement in the obscenity crime, the result would be to translate the innocent confusion which may have existed in some areas in the past into a weapon of destruction to be used against the people's cause.

This proposition can best be stated with an actual case example. Following the adoption of the hard-core pornography rule by the California Supreme Court in *Zeitlin v. Arnebergh,* 59 Cal. 2d 930, 383 P. 2d 152, 31 Cal. Rptr. 800 (July, 1963), law enforcement came to a virtual standstill in California. At the same time, an operator of a Main Street Arcade in Los Angeles was appealing a jury conviction obtained under the former *Roth-Alberts* test, for exhibiting girlie film "A" at the arcade. At the hearing on appeal, the court asked the Deputy City Attorney for arguments as to whether it was hard-core pornography and, receiving none, reversed the conviction, although other cases involving similar materials had consistently been upheld on appeal in that court. Whereupon, an employee of the Main Street operator moved into a more respectable neighborhood in County territory and opened a similar girlie film arcade, where he was arrested for exhibiting girlie film "B" which was substantially similar to girlie film "A". Thereafter, in successive proceedings: (1) on a petition for a writ of habeas corpus to the Superior Court; (2) a petition for a hearing in the Supreme Court; (3) on a motion to strike the complaint; before trial (4) on a motion to strike the complaint at the trial, and (5) in attempting to get girlie film "A" into evidence, the defense attorney subpoenaed girlie film "A" and even went so far as to subpoenae one of the

three appellate judges who had ruled on girlie film "A", to lay the foundation for a "good faith belief" defense. Looking at it objectively, what better "good faith belief", than reliance on the decision of an appellate court. To permit such to occur would translate mistake into immunity, all to the detriment of the community.

A similar situation has been created through a lack of understanding as to the meaning of this Court's rulings on injunction actions involving books which lay claim to literary merit, like Henry Miller's works and "Fanny Hill". The argument is "If this isn't obscene, what is?" with the result that successful prosecution of peddlers of hard-core pornography is being undermined by a claim of a right to a "good faith belief" defense, based upon their understanding (misunderstanding) of the *Fanny Hill* result.

Nor is this the only disastrous result. Such an action would overrule the holding in *Schindler v. U.S.*, 208 F. 2d 289, 290 (Nov. 30, 1953), cert. den., 347 U.S. 938. In that case, appellant placed an attorney on the stand and inquired of him whether he had advised appellant that in his opinion the various books involved in the mailing were "proper and legal". After objection, appellant offered to prove that he had in good faith consulted the attorney during the preparation for advice and had acted on his advice. The court rejected the offer, citing the *Rosen* case and the public policy involved, and this Court denied certiorari.

It is submitted that the foregoing situation did not exist in 1957 or in 1962 when the Model Penal Code provisions were considered. If the "subjective" knowledge and "good faith belief" defense were adopted as a constitutional requirement, the effect would be to open

Pandora's Box at a time in history already fraught with its own immediate problems which plague obscenity controls.

B. The Instruction Requested by Petitioner Was Improper Under "Good Faith Belief" Defense for the Mental Element Prescribed by the Kentucky Statute. It Failed to Instruct the Jury That Reasonable Grounds for the Belief Were Also Required.

Assuming petitioner was entitled to an instruction, still the instruction requested was erroneous.

A person's mistake as to a matter of either fact or law, where it is recognized, is a defense only if it negatives the existence of the mental state which the statute prescribes.

Thus, if the offense charged is one requiring a *specific* content in the true sense of intent, guilt may be disproved by an honest belief inconsistent with such an intent, even if the belief results from a mistake of law not based upon reasonable grounds. In other words in such a situation, a belief may be very sincere although not very reasonable and may even be reckless.

If however, for the guilt of the offense charged, there is required some lesser subjective mental element other than a specific intent in the true sense of the word, the question whether a mistake not based upon reasonable grounds could disprove guilt depends upon the scope of the special element for guilt. Where, as in the case of Kentucky Statute, the mental element is, or approaches reckless conduct, at the outside (knowledge of the content and character) a good faith belief based on reckless grounds would not be a defense since it is *not* inconsistent with the mental element required.

The instruction which petitioner requested, therefore was faulty in failing to instruct the jury that reasonable grounds were required for the belief. Perkins on Criminal Law, the Foundation Press, Inc. (1957), pages 806, *et seq.;* Model Penal Code (Draft 4), Section 2.04(1) and comments on pages 135 to 137. Amicus Curiae Council for Periodical Distributors Assn., Inc. appears to agree on this point. (Amicus Br. pp. 3, 6.)

C. The Evidence Which Was Excluded Was Inadmissible on the Grounds Offered.

As to the importance of a second-class permit, petitioner stated

> "we use the second-class permit quite a bit. We feel like a magazine that don't have a second-class permit maybe should be withheld from general distribution, *but frankly, I can't see any difference in the ones that have and don't have.*" [R. 30; our emphasis.]

By his own admission, the index he purported to use was of no value. Further testimony on such matter was irrelevant and immaterial. Such testimony did not tend to prove reasonable grounds for a good faith belief. Further, he indicated that the lack of a second-class permit did not mean that the magazine had been turned down by the Post Office Department, but that it may also mean that it had not been submitted. [R. 33.]

Plaintiff's answer "It is Impossible", in response to the question whether it would be possible for his concern to economically run an outfit like Readmore Newsstand and personally censor each of the 12,000 titles [R. 31], was objectionable as calling for a conclusion. Beyond this the question was leading and suggestive and argumentative.

The letter dated February 8, 1959 to Ray Kirk was irrelevant and immaterial, being too remote in time. Insofar as the letter pertained to the second-class permit matter, it was subject to the same objections noted above.

None of the evidence offered above tended to prove reasonable grounds for a good faith belief.

IV.

STANDARDS AND CRITERIA FOR REVIEWING THE STATE COURT JUDGMENT.

Petitioner was tried and convicted twice in a state court, both instances after jury trial and under rules of criminal procedure which accord the maximum safeguards to the rights of an individual *i.e.,* proof beyond a reasonable doubt and unanimous verdict. The state statute under which he was tried was enacted by the legislature in aid of public morality in relation to the sex function. The *mens rea* requirement was interpreted by the state judiciary to require proof of "knowledge of the contents and character" of the magazines, which under our analysis requires proof of an awareness an awareness of the nature of the materials from an "objective" viewpoint.

On this Writ, Petitioner seeks reversal of a State Court judgment claiming infringement of constitutional rights based upon the nature of the materials involved; and a special provision of the State Statute which was neither a part of the charge nor involved in the trial. The entire statute (KRS 436.100) has been repealed during the 1966 regular session of the legislature, being replaced by a new obscenity statute, KRS 436.101. The special presumption is not a part of KRS

436.101, and no longer exists under Kentucky Law, except as it relates to this appeal.

There authority for the view that this Court should not consider the constitutionality of a statute in the abstract. *United States v. Raines, supra.* Particularly should this be so where the statute, because of repeal, is inoperative and will have no application in the future.

This, being a review of a jury trial in a state court, involves rights arising out of the Seventh Amendment which accords special importance to jury determinations. In such cases this Court will review the findings to analyze the facts in order to pass upon the Federal Question. *New York Times Co. v. Sullivan,* 376 U.S. 254, 11 L. Ed. 2d 686, 710, 84 S. Ct. 710 (Mar. 9, 1964).

Assuming that this Court sustains the scienter provisions as being within constitutional limitations, the remaining question relates to the standards and criteria to be followed in applying the law to the facts. We believe the function of the court in this event to be similar to that stated by Justice Brennan in his dissent in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, 448, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957).

> "Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

See A.L.I. Model Penal Code 207.10 (1957 draft) Reporters Comments p. 16; *United States v. Kennerley,* 209 Fed. 119, 120 (S.D. N.Y. 1913)

> "The same question arises as would arise upon motion to direct a verdict at the close of the case."

To say that obscenity is *primarily* a question of fact for the jury and that under the Seventh Amendment such

facts are not reviewable, is not to suggest, that in every instance such is the case. On the contrary, the Court has its proper role, as does the jury. As the jury may sometimes overstep its bounds *United States v. Dennett,* 39 F. 2d 564, so also may a lower court. *People v. Birch All State News et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing 40 Misc. 2d, 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963).

The division of responsibility and the role which the Court plays, in practice, may in some cases appear difficult of statement. Perhaps the best statement is that of Justice Brennan at the end of the arguments in the *Fanny Hill* case on Dec. 8, 1965: "In other words, we are not making a judgment as experts of literature or prurient interest or anything else, but experts in the application of the constitutional test." We envision the test as a simple one. Is the defendant "pandering," (viewed objectively), or is he "speaking"?

We think there is little doubt from the exhibits in this case that "pandering" (objectively) is involved and take issue with petitioner's claim to the contrary. An examination of the materials at a quick glance, reproduced in the appendix herein, sufficiently demonstrates this quality. The summary of the testimony given during the *Commonwealth's* case in chief, appearing herein, in the Statement of Facts confirms what the pictures show at a glance.

Having satisfied itself that "free speech" is not involved, it would appear that a "sufficient evidence" standard of evidence should suffice. *Jacobellis v. Ohio,* 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (June 22, 1964) Justice Warren dissenting.

A word need be said about the "recklessness" of the petitioner's action. It is defying reason to say that petitioner does not know the products he is distributing. His many years of involvement in the distribution business mark him as an expert in the area. *He is no neophyte.* The reputation of *All State News* is well known in the trade *People v. Birch, All State News et al. supra, Com. v. James J. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715, 718, as is Spree Magazine. See *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225 (Dec. 13, 1963); *Mahon v. Rachleff,* 15 Fla. Supp. 136 (Dec. 17, 1959), aff'd in 124 So. 2d 878 (Nov. 29, 1960); *Commo Pennsylvania v. Levan,* 52 Berks. 160 (Aug. 19, 1960) and *Chobot v. Wisconsin,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960).

The Independent Distributors throughout the United States have a closely knit trade organization for the easy exchange of information. See Who's Who in Magazine Distribution. Ziff-Davis Publishing Co., Copyright 1960 Library of Congress Card Catalog No. 60-100057. In its amicus brief council for Periodical Distributors Associations Inc. at page 5 suggests criteria for determining scienter and excuse the non-performance of their clients. We submit there is much the distributors could do but they prefer not to. The prosecutor noted in his closing arguments what was wrong with petitioner's "cooperation." He wanted "the magazine" and "the issue" pointed out for his consideration, yet he carried a full assortment of girlie magazines (25-30), most of which appear on the markets with a new issue each month.

It wasn't as though the trade was taken by surprise. The communities have been attacking this problem for years. See *Conn v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *Monfred v. Maryland,* 226 Md. 312, 173 A. 2d 173 writ of certiorari denied 368 U.S. 953, 82 S. Ct. 395, 7 L. Ed. 2d 386 (Jan. 8, 1962); *Goldstein v. Virginia* writ of certiorari denied 372 U.S. 910; 83 S. Ct. 726, 9 L. Ed. 2d 720 (Feb. 18, 1963); *Chobot v. Wisconsin, supra,* appeal dismissed for want of a federal question; *New Jersey v. Hudson County News,* 41 N.J. 247, 196 A. 2d 225 (1963).

In the 7 years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and circumstantial evidence *United States v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960), *certiorari* denied, 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (October 10, 1960), rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (November 21, 1960); *California v. Harris,* 192 Cal. App. 2d 887, 893, 13 Cal. Rptr. 642, 646 (May 5, 1961) reversed on other grounds, *In re Harris,* 366 P. 2d 305; *United States v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), *certiorari* denied, 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961); *Harold S. Kahm v. United States,* 300 F. 2d 78 (February 9, 1962) *certiorari* denied, 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *California v. Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Sept. 26, 1962) cert. denied 377 U.S. 994; *New York v. Finkelstein,* 11 N.Y. 2d 300 (1962), *certiorari* denied, 371 U.S. 863 (1962); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (November 29, 1960), appeal

dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961). See also *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (November 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (December 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,* 176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* 204 N.E. 2d 768 (January 21, 1965); *Missouri v. Vollmar,* 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* .... Ohio St. ..... (July 13, 1966); *California v. Campise,* 51 Cal. Rptr. 815 (May 25, 1966); *California v. Culbertson,* 51 Cal. Rptr. 827 (May 25, 1966).

Conclusion.

The October term 1966 calendar is already topheavy with an unprecedented 20 obscenity cases seeking review of adverse judgments in state and federal courts. Seventeen of the twenty cases seek review of criminal convictions. All but one of the criminal cases involve retailers. In thirteen of the criminal cases, petitioners have raised "scienter" as a grounds for reversal. A broad spectrum of the industry is included in the case Exhibits—8 paperback books, 10 girlie magazines, assorted nudist magazines, 12 bondage books and magazines, 4 girlie motion picture films and assorted photos of semi-nude females in provocative poses. All have one element in common—the type of material involved.

In our view, the "mens rea" of those who furtively distribute photographs and films in "under the cover

operations" with a "Do you want to buy some filthy pictures" or "Do you want to buy some stag (bachelor) films" is indistinguishable from the Times Square Merchant, who touts his wares as "the best on the market," or the neighborhood retailer, petitioner here, who sells stapled girlie magazines loaded with the same photographs in the local drug or liquor store, or the retailer, who under the subterfuge that he has other aims in mind, peddles the modern nudist magazine "which shows more." Nor does the *modus operandi* become more acceptable to government by suggesting, in retrospect, that any photo or edition would have been removed from the market had the photo or edition been identified as "objectionable." All such conduct is "reckless." The suppliers, not the "vigilantes" are at fault.

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1964

No. _____

WILLIAM L. AUSTIN, - - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

BRIEF OF THE KENTUCKY CIVIL LIBERTIES UNION AMICUS CURIAE.

May it please the Court:

This Brief of Kentucky Civil Liberties Union, Inc., as amicus curiae, is filed with the consent of the parties, pursuant to Rule 42 of this Court; written consents, signed by counsel for each party, have been filed.

INTEREST OF AMICUS.

The American Civil Liberties Union has been engaged for more than forty years in defending the Bill of Rights. Foremost of those rights is the First Amendment which declares that "Congress shall make no law . . . . abridging the freedom of speech, or of the press . . . ." It is clearly established that by virtue

of the Fourteenth Amendment this injunction is also applicable to the states. Notwithstanding this injunction, the Petitioner in this case has been convicted under a Kentucky Statute (KRS 436.100) of selling two "obscene" magazines and fined $250.00. This conviction has been sustained by the Court of Appeals of Kentucky (386 S. W. 2d 270 (1965)).

This case is another sad incidence of judicial sanction of the censor. The Amicus believes that the conviction and affirmance constitute that kind of threat to literary freedom and First Amendment guarantees that necessitates the granting of certiorari.

STATEMENT OF FACTS.

The Petitioner was convicted under the Kentucky Obscenity Statute (KRS 436.00) of selling in his bookstore in Paducah, Kentucky, two obscene magazines, "High Heels" and "Spree," pursuant to a complaint sworn out by a citizen of Paducah, Kentucky. At the trial no evidence was introduced by the Commonwealth of Kentucky to show that the Petitioner had personal knowledge of the presence of these magazines in his store or of their contents. The Petitioner was not present in his store at the time the complainant had purchased the two magazines and no inquiry or complaint had been received by the Petitioner concerning these magazines at any time prior to the purchase. The Petitioner operates five news and magazine outlets in Western Kentucky, Tennessee, Southern Illinois and Southeastern Missouri, in addition to the Paducah

bookstore. The bookstore handles approximately 11,000 publication titles every month, including best sellers, technical books, periodicals, newspapers and religious books. In large part the trial court excluded testimony by the Petitioner's expert witness and other witnesses concerning the literary standards of the local and national community and the general acceptance by the community of the type of magazine to which the two magazines in issue belong.

REASONS FOR GRANTING THE WRIT.

(1) This case is illustrative of the difficulties in complying with the standard for determining "obscenity" enunciated in *Roth* v. *United States*, 354 U. S. 476 (1957). In view of these difficulties, certiorari should be granted in order to reconsider the *Roth* standards. There has been considerable comment by members of this Court and by others indicating that the standards are vague and unworkable.[1]

Some of the difficulties have already been suggested to this Court in Amici briefs previously filed with the Court:

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[1] *Roth* v. *United States*, 354 U. S. at 494-495 (Mr. Chief Justice Warren concurring); *Smith* v. *California*, 361 U. S. 147, 157 (Mr. Justice Black concurring); *Roth* v. *United States*, 354 U. S. at 512-514 (Mr. Justice Douglas dissenting); *Roth* v. *United States*, 354 U. S. at 497-498 (Mr. Justice Harlan concurring in part and dissenting in part).

Lockhart and McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 Minn. L. Rev. 5 (1960); Kalven, *Metaphysics of The Law of Obscenity*, Supreme Court Review (Univ. of Chicago Press, 1960). See Brief (pp. 16-41) of the American Civil Liberties Union, *amicus curiae*, in *Jacobellis* v. *Ohio*, *infra*.

1. What are the standards of sex portrayal "in a manner appealing to prurient interest" "and having a tendency to excite lustful thoughts" to be applied in actual cases?

2. How do we determine who is the "average person" whose "prurient interest" or "lustful thoughts" must be aroused before a publication may be adjudged obscene?

3. How do we determine what material is "utterly without redeeming social importance"?

4. Is the determination according to literary or artistic standards or is it left to the happenstance standards of the trial jury?

This case is another example of the impracticality—if not the invalidity—of the *Roth* standards. Full briefing and oral argument will pose the opportunity to reexamine again the tenuous basis upon which this judicial restriction upon First Amendment freedoms incorporated in the Fourteenth Amendment due process protections rests.

(2) Certiorari should be granted to reconsider anew whether *Roth* unnecessarily—if not wrongfully—departed from the clear and present danger test, the tested constitutional standard for allowing the fullest exposition of the principles of a democratic society without endangering competing social interests.

The American Civil Liberties Union, of which the Kentucky Civil Liberties Union is an affiliate, has consistently taken the position with which we concur, that "obscenity," as much as any other form of speech or publication, is entitled to the protection of the First

Amendment. In each instance, then, the issue is whether the speech or publication is used in such circumstances or is of such a nature as to create a clear and present danger that it will bring about a substantive evil which the state has a right to prevent.

We believe that there is no demonstrable connection between the evil which obscenity statutes are intended to avoid and the means chosen to avoid that evil.[2]

There is no clear and present danger that the utterances sought to be prohibited will bring about the evil to be avoided. Based on present day evidences, the unlikelihood of the evils resulting from the conduct suppressed is so clear that no invasion of First Amendment rights is justifiable.

(3) Finally, certiorari should be granted in this case so that "as in all others involving rights derived from the First Amendment guarantees of free expression, this Court [can make] an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected." *Jacobellis* v. *Ohio,* 378 U. S. 184, 190 (1964).

The standard for determining "obscenity" which was enunciated in *Roth* v. *United States,* 354 U. S. 476

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[2]See analysis of sociological studies on this point in Judge Frank's concurring opinion in *U. S.* v. *Roth,* 237 F. 2d 786, 804 2d Cir. 1956); Lockhart & McClure, *Obscenity and the Courts,* 20 Law and Contemp. Probs. 587, 595 (1955); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40 (1942); see also Jahoda and Staff of Research Center for Human Relations, New York University: *The Impact of Literature, A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954) (results of this study reported in the appendix to Judge Frank's concurring opinion in *U. S.* v. *Roth,* supra); Lockhart & McClure, *Literature, The Law of Obscenity, and the Constitution,* 38 Minn. L. Rev. 295, 387 (1954); and see *Commonwealth* v. *Gordon,* 66 Pa. D. & C. 101 (1949).

(1957) and *Manual Enterprises* v. *Day*, 370 U. S. 478 (1962), is by the Court's own admission "not perfect" (*Jacobellis* v. *Ohio*, 378 U. S. 184 at 191 (1964)), and the line between "obscenity" and expression which is constitutionally protected is admittedly "dim and uncertain" (*Jacobellis* v. *Ohio*, 378 U. S. 184 at 187 (1964)). Thus, the Court has the responsibility, as long as *Roth* is the constitutional key, to examine the whole record in "obscenity" convictions with the greatest care to insure that freedom of speech and of the press is not sacrificed to the censor, over-zealous or not. Cf. *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963).

CONCLUSION.

For the reasons set forth above certiorari should be granted.

Respectfully submitted,

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The pertinent provisions of the Kentucky Revised Statutes, on their face and as construed and applied to eliminate a defense of good-faith belief that publications are not obscene, abridge freedoms of speech and press and arbitrarily deprive the accused of liberty without due process of law, contrary to the provisions of the First and Fourteenth Amendments 2

II.

The pertinent provisions of the Kentucky Revised Statutes, on their face and as construed and applied to exclude evidence, both oral and documentary, showing that an accused in an obscenity prosecution had no knowledge of the contents or of the alleged obscenity of the publications, abridge freedoms of speech and press and arbitrarily deprive the accused of liberty without due process of law, contrary to the provisions of the First and Fourteenth Amendments 5

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

PETITIONER'S REPLY BRIEF.

The statute here under consideration [KRS 436.100] was repealed, and a new obscenity statute enacted, as of June 11, 1966. The new statute provides in relevant part: "Any person who, having knowledge of the obscenity thereof . . . has in his possession with intent to distribute . . . any obscene matter is punishable by fine . . . or, imprisonment. . . ." [New KRS 436.100(2)]. At the same time, the Legislature eliminated the section of the old law [KRS 436.100(4)], providing that the sale of any book or magazine found to be obscene shall be *prima facie* evidence that the seller had knowledge of the obscene character of the material.

It thus appears that in Kentucky today no person can be held criminally liable unless the State shoulders the entire burden of proving beyond a reasonable doubt that the accused had knowledge of the obscenity of the challenged work.

This reply brief is addressed solely to Points II and III of Respondent's Brief. Petitioner is content to rely on his brief (Pet. Br. 42-46) in answer to Point I of Respondent's Brief.

I.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Eliminate a Defense of Good-Faith Belief That Publications Are Not Obscene, Abridge Freedoms of Speech and Press and Arbitrarily Deprive the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

(a) Respondent first argues that petitioner could not have had an honest belief that the magazines were not obscene and, hence, petitioner's defense on this ground was properly not submitted to the jury (Resp. Br. 13). Respondent's argument, on this point, reduces itself to the proposition that *all* "girlie" magazines, *i.e.*, magazines containing photographs of nudes, are obscene, and that all persons who sell such a magazine, knowing it to contain photographs of nudes, are conclusively presumed to know the magazine is obscene (Resp. Br. 12-13).

The overwhelming weight of authority however establishes that mere nudity, whether found in "girlie" magazines or elsewhere, is not obscenity. In *Manual Enter-*

prises, Inc. v. Day, 370 U.S. 478, 489-490, Mr. Justice Harlan said of magazines portraying male nudes:

> "Our own independent examination of the magazines leads us to conclude that the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry. But this is not enough to make them 'obscene.' . . . . [T]he portrayals of the male nude cannot fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates. Of course, not every portrayal of male or female nudity is obscene."

See, *Sunshine Book Co. v. Summerfield,* 355 U.S. 372; *Mounce v. United States,* 355 U.S. 180; *Parmelee v. United States,* 133 F. 2d 729 (C.A. D.C. 1940); *Excellent Publications, Inc. v. United States,* 309 F. 2d 362 (1 Cir. 1962); *Humor Magazine, Inc. v. United States,* 311 F. 2d 576 (1 Cir. 1963); *In re Louisiana News Co. v. Dayries,* 187 Fed. Supp. 241 (D.C. La. 1960); *LeBaron v. Olesen,* 125 Fed. Supp. 53 (D.C. S.D. Calif. 1954); *People v. Richmond County News,* 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961); *Larkin v. G. I. Distributors,* 14 N.Y. 2d 869, 252 N.Y.S. 2d 81, 200 N.E. 2d 768 (1964); *Connecticut v. Martin, et al.,* 26 Conn. Super. Ct. 84, 213 A. 2d 459; *Fanfare Films, Inc. v. Motion Picture Censor Board v. Maryland,* 234 Md. 10, 197 A. 2d 839; *Commonwealth v. Moniz,* 338 Mass. 442, 155 N.E. 2d 762 (1959); *Matter of Excelsior Picture Corp. v. Regents,* 3 N.Y. 2d 237, 143 N.E. 2d 31 (1957); *State of Lerner,* 51 Ohio L. Abs. 321, 81 N.E. 2d 282 (1948); *State v. Locks,* 97 Ariz. 148, 397 P. 2d 949 (1964).

It is arbitrary and a denial of due process to make any presumption, much less a conclusive one, that a bookseller knows a magazines is obscene merely because he may know it contains portrayals of nudity. The portrayal of sex and nudity is not, of course, outlawed by the obscenity laws, and a bookseller cannot be made criminally responsible for distributing a publication which a jury may find obscene when all the bookseller knows about the work is that it deals with these important and popular subjects. If those who circulate the press are to be so stripped of legal protection, they will necessarily be forced to bow to pressure groups and refuse to circulate whatever books or magazines find disfavor with those who patrol the newsstands. The bookseller's timidty in the face of his fear of criminal conviction "would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith v. California,* 361 U.S. 147, 154.

(b) Respondent next argues that the trial court properly withheld from the jury the issue of petitioner's good-faith belief in the nonobscenity of the magazines, because petitioner did not claim that he had read the magazines prior to the date of his arrest (Resp. Br. 14).

It is plainly not the law that a bookseller must testify against himself, *i.e.,* that he read and knew the contents of the challenged work, before he can show that he had an honest belief that the publications were not obscene. See, *United States v. Matot,* 146 F. 2d 197,

198 (2 Cir. 1944); *Haigler v. United States,* 172 F. 2d 986, 988 (10 Cir. 1949); *Norcott v. United States,* 65 F. 2d 913, 919 (7 Cir. 1933). To rule otherwise would require the overruling of *Smith v. California.*

II.

The Pertinent Provisions of the Kentucky Revised Statutes, on Their Face and as Construed and Applied to Exclude Evidence, Both Oral and Documentary, Showing That an Accused in an Obscenity Prosecution Had No Knowledge of the Contents or of the Alleged Obscenity of the Publications, Abridge Freedoms of Speech and Press and Arbitrarily Deprive the Accused of Liberty Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments.

Petitioner sought in vain to prove that he believed the magazines in question were not obscene. Petitioner attempted to show that he could not have examined all of the thousands of publications he handled [R. 50]; that for many years he had openly and freely sold "girlie" magaine, such as "Playboy",[1] "Rogue", "Cavalier", and many others, without complaint [R. 37] in the States of Tennessee, Kentucky, Missouri and Illinois [R. 27, 49]; that he limited the "girlie" magazines he handled to those which he believed enjoyed second-class mailing privileges granted by the Post Office Department [R. 31, 33-34, 49-50];[2] that

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[1]Petitioner testified that he regularly read "Playboy" and considered "Spree" and "High Heels" "practically the same kind" [R. 43].

[2]No obscene magazine may obtain second-class mailing privileges. 39 U.S.C. 4355.

this Court had found that nudist magazines, revealing more of the human body than the magazines in this case, were not obscene [R. 62]; and that the Paducah Public Library had books containing nudes as revealing as those contained in the magazines herein [R. 63-64].

Petitioner's excluded evidence concerning the wide and open sale of "girlie" magazines containing second-class mailing privileges and the general availability of nude photographs, including the presence of books with such photographs in the Paducah Public Library, tended to showed that magazines containing nudity are generally tolerated by society and are within customary limits of candor. This evidence was relevant to show that petitioner honestly believed the magazines at bar were not obscene. The trial judge rejected this evidence totally. "This had the effect of depriving [petitioner] of the opportunity to offer any proof on a constitutionally relevant issue." Mr. Justice Harlan concurring in *Smith v. California*, 361 U.S. at 172.

Conclusion.

The judgment should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

PETITION FOR REHEARING.

PETITIONER, COMMONWEALTH OF KENTUCKY, prays that a rehearing be granted of this Court's decision of May 8, 1967, reversing the judgment of the McCracken Circuit Court of McCracken County, entered in the above-entitled case on February 28, 1964, and that the case be ordered restored to the docket for argument at the next term of Court on Question 1 presented by the petition for certiorari which reads as follows:

1. Whether, consistent with the free speech and press provisions of the First Amendment and the due process requirements of the Fourteenth Amendment, as well as the constitutional standards for judging obscenity enunciated by decisions of the Supreme Court, the two publications involved in the prosecution herein upon which the judgment of conviction was rendered are entitled to constitutional protection.

The unusual procedural aspects of this case, as recited in Point I herein, make the petition for rehearing longer than would be expected in the usual case, in as much as the supporting reasons for the rehearing have not, as yet, been briefed or argued before the Court.

Reasons for Granting Rehearing and Restoring Case to Docket for Argument on Question 1.

I.

This Court's Opinion of May 8, 1967, Resolving a Major Question of Law Without Permitting the Commonwealth to Lend Advocacy by Way of Brief and Oral Argument in Support of Its Cause Is Basically Unfair and Is a Radical Departure From Appellate Procedures Heretofore Followed by This Court.

In its grant of certiorari on April 25, 1966, in *Austin v. Kentucky* and *Redrup v. N.Y.*, 16 L. Ed. 2d 438, this Court's order limited argument to the issue of scienter, although both Austin and Redrup had raised the obscenity vel non issue in their petitions. The same procedure was followed in *Gent v. Arkansas*, 16 L. Ed. 2d 537, but in that case the court, by a 6-3 vote, specifically denied certiorari on the obscenity vel non issue (questions 4-8) of the jurisdictional statement on appeal.

During oral argument on October 10, 1966, Justice Stewart who had voted with Justices Black and Douglas for grant of certiorari on all issues asked Assistant Attorney General John Browning during Kentucky's presentation if the case should not be reversed for failure of the trial court to instruct the jury properly on the issue of obscenity (*i.e.*, in failing to instruct the jury in terms of redeeming social importance). Assistant Attorney General Browning advised the Court

that because of the limited grant of certiorari, respondent had not taken time to brief and was not prepared to argue the other issues raised in the petition, whereupon Justice Clark remarked that from the limited grant of certiorari it must be *assumed* that the subject matter was obscene. From respondent's recollection, no member of the Court bothered to reply to Justice Clark's statement, nor was the obscenity vel non issue inquired into thereafter.

In its decision, seven months after the case was submitted,[1] seven members of this Court reversed the state court judgment on the very ground which was excluded from the writ of certiorari the court had granted to appellant, which ground, Justice Clark had stated on oral argument, was not open to dispute or oral argument. Further, in its earlier action in *Gent*, involving girlie magazines which did not approach the offensiveness of "Spree" and "High Heels", six members of this Court had specifically noted that such question was nonappealable and under its certiorari jurisdiction had *denied* certiorari.

On this record, we do not think it lacking in respect to join with Justices Harlan and Clark when they state (in dissent) "these dispositions do not reflect well on the processes of the Court, and I think the issues for which the cases were taken should be decided."

If legal briefing and argument is thought to serve a useful purpose (and we think it does)[2] then it would

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[1]The Wire Services drew particular attention to this time factor. "In doing so, however, the court gave the public a glimpse of its indecision on the subject—and indecision which delayed the cases nearly a year."

[2]On the importance of argument and briefing in cases before this Court, see Supreme Court Practice—Stern and Gressman,

(This footnote is continued on the next page)

seem that the May 8 opinion should be vacated and the cause restored to the docket for further briefing and argument on the major issues which have been raised thus far in the briefs and in the Court's opinion. For this and the other reasons stated herein, respondent seeks a rehearing.

II.

This Court's Per Curiam Opinion Is Ambiguous in That It Appears to Be in Conflict With the Rationale Expressed by a Majority of This Court in Mishkin and Ginzberg, Decided During the 1965 Term.

During the 1965 term, a majority of this Court held that the variable approach to obscenity was consistent with constitutional standards, and applied its rationale in interpreting the Federal Obscenity Postal Statute and the N.Y. Obscenity Statute. *Mishkin v. N.Y.*, 383 U.S. 502; *Ginzberg v. U.S.*, 383 U.S. 463 (March 21, 1966). For recent Appellate Court decisions supporting this construction see: *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 73, 271 N.Y.S. 2d 947, 218 N.E. 2d 668; *New York v. Tannenbaum*, 18 N.Y. 2d 268, 274, ... N.Y.S. 2d 231 (Sept. 29, 1966); *Interstate Circuit, Inc. et al. v. City of Dallas*, 366 F. 2d 590, 596 (Aug. 30, 1966). See also: National Decency Reporter, published by Citizens for Decent Literature, Inc., June-July 1966, entitled "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions," at page 6 *et seq.*, wherein the authors remark:

> "Under the 'variable' obscenity approach, the term 'obscenity' as defined in Roth-Alberts functions in accordance with two variable factors: (1)

3rd Ed., at pages 352, 353, the authors concluding: "What has been said should be sufficient to show the inadvisability of submitting (without argument) if counsel wishes to do everything possible toward winning this case."

the nature of the materials, and (2) the use of the materials, i.e., the manner in which they are employed. . . ."

Notwithstanding the clear expressions in *Mishkin* and *Ginzburg* and the fact that the *per curiam* opinion in *Redrup-Austin-Gent* reaffirms that rationale through its citation of *Ginzburg,* the hodge podge created by treating together in one all-too-brief opinion (and failing to distinguish) a prior restraint case, which treats the *res* rather than conduct, and a criminal case, which deals only in conduct, coupled with the adverse results suffered by the prosecution in all three cases, creates an illusion that this Court has retreated to constant obscenity concepts.

Certainly the *per curiam* opinion provides fuel for such an argument and already the fires are lighted. Emmanuel Redfield, counsel in the *Gent* case, is reported in the New York Times of March 9, 1967 as saying:

> "This is the first time the Court has given its seal of approval to this type of material."

After noting that Mr. Redfield represented the publisher of "Gent", the article went on to state:

> "The two other 'girlie' magazines, High Heels and Spree, were named in a Paducah, Ky., case, and the two paperback books figured in a New York City case.
>
> Mr. Redfield said in a telephone interview that the Court's decision would protect the magazines from obscenity charges 'in any village in the land,' as long as future issues are similar in content."

It has been reliably reported that Corinth Publications intends to republish "Shame Agent" and "Lust

Pool", the republished version to show the imprimature of this Court on that subject matter.

Logically, this result cannot follow since *Ginzburg* is still ruling precedent, for were one to place "Spree" and "High Heels" alongside "Eros Vol. 1 No. 4", it would defy reason to hold the former to be protected materials *under all circumstances, w*hereas the latter is not. More in point, were the Commonwealth of Kentucky to undertake a prosecution against the publisher of "Spree", for causing "Spree" to be sent into the Commonwealth of Kentucky for sale and distribution, it surely could not legitimately be argued that the rationale expressed in the *Redrup-Austin-Gent per curiam* opinion would under all circumstances bar an action against him as to the subject matter in this case. *Ginzburg v. U.S.* (*supra*).[3]

Unfortunately, however, when this Court in its *per curiam* opinion concluded:

> "Whichever of these constitutional views is brought to bear upon the *cases* before us, it is clear that the judgments cannot stand." (Our emphasis.)

the author failed to emphasize (as we have above) that the Court was considering "cases" which were qualified by specified factual situations and was not considering the "subject matter" in vacuo. Nor did this Court take the precaution to raise the caveat expressed by Justice Brennan in "A Book Named Memoirs of a Woman of

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[3]Perhaps this Court will clear up some of this confusion in its ruling in Keney v. N.Y., No. 2, Oct. Term 1966 where the *proprietor* of paperback books almost identical to "Lust Pool" and "Shame Agent" indicated to undercover police officers, in promotion that his books were "hot books" and "spicy books".

Pleasure vs. Attorney General", 16 L. Ed. 2d 1, 6, to the effect that "It does not necessarily follow from this reversal that a determination that Memoirs is obscene in the constitutional sense would be improper under all circumstances."

It would appear from the brief discussion noted above, that, viewed in its most favorable light, the opinion is ambiguous, and if allowed to stand unmodified or unqualified, will bring complete confusion to the law and gives promise of destroying the sanity which came into the law in the *Ginzburg-Mishkin* cases.

III.

Whether or Not "Spree" and "High Heels" Are Obscene Is a Question of Fact for the Jury's Determination.

A. *Obscenity Is Primarily a Question of Fact for the Jury's Determination.*

Certainly the Roth Court followed this traditional approach as laid down by Judge Hand in *United States v. Kennerley,* 209 Fed. 119 (1913) and consistently followed by other courts in subsequent cases. *United States v. Levine,* 83 F. 2d 156, 157, cited in *Roth* at footnote 26. *People v. Noroff,* 58 Cal. Rptr. 172, 175 (April 13, 1967). Roth involved such a jury trial. Justice Brennan, speaking for a majority of the Court, cited with approval the following jury instruction given in *Roth,* reflecting this time-honored right of the jury, at page 490:

> "In this case, ladies and gentlemen of the jury, you and you alone are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and the irreligious—men, women and children."

Until this Court's decision on May 8th in Austin, Justice Brennan gave what appeared to be sincere recognition to this tradition. In his dissenting opinion in *Kingsley Book, Inc. v. Brown* (1957), 354 U.S. 436, he said:

> "In Alberts v. California, and Roth v. U.S., decided today, 1 L ed 2d 1498, the court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. *The statutes there involved allowed a jury trial of right, and we did not reach the question whether the safeguards necessary for securing the freedoms of speech and press for material not obscene included a jury determination of obscenity.*
>
> "*The jury represents a cross-section of the community and has a special aptitude for reflecting the views of the average person.* Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity *which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards.* A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. *Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e.,* that reasonable men may differ whether the material is obscene." (Our emphasis.)

As late as June 1964, Chief Justice Warren indicated his accordance. See his opinion dissenting in *Jacobellis v. Ohio,* 378 U.S. 184, 200, 202. To the Chief Justice, the community was the local community, the constitutional standard was not fixed at hard-core pornography and the standard of review was that of "sufficient evidence"—requiring something more than merely any evidence but something less than "substantial evidence" on the record (including the allegedly obscene material) as a whole.

At one time Justice Stewart acknowledged this tradition. Writing the majority opinion in *Volanski v. U.S.,* 246 F. 2d 842, 845 (June 7, 1957), he voted to reverse an obscenity conviction after court trial, and to remand the same for a new trial "preferably by a jury". Concerning the function of judge and jury, he said at page 845:

> "The question in our opinion is peculiarly one best left for nisi prius determination, preferably by a jury. . . . 'The problem is to find a passable compromise between opposing interests, whose relative importance like that of all social or personal values, is incommensurable. We impose such a duty upon a jury. . . .' U.S. v. Levine, 2 Cir. 1936, 83 F.2d 156, 157. A trial court can best determine 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.' A trial court, particularly with the aid of a jury, can best determine 'the average conscience of the time.' U.S. v. Kennerley, DCSDNY, 1913, 209 F. 119, 121."

His was the deciding vote which sent Volanski back for a jury trial. In the *Volanski* case Justice Stewart

was talking about material which he described at page 843 as:

> "Each set of the pictures in question consists of twelve photographs of a young woman in various poses and various stages of undress. In none of the frontal views is the subject totally unclothed below her waist. In some of the posterior views she is. The photographs are without even tenuous pretentions to artistic or scientific merit. They are unaccompanied by any text. Although some of the poses are rather bizarre, no subject is shown engaged in any indecent or immoral activity. . . ."

The resemblance of the *Volanski* material to the "Spree" and "High Heels" material is clear.

Even Justice Black, at times, seemed to acknowledge this principle—though reluctantly (see footnote[4]).

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[4]In modern American terms, the traditional and characteristic function of the jury is expressed in Windolph's "The Country Line" (1958) as:

> "Its underlying principle is that the sanctity of law arises not from the fist of any potentate, however benevolent, nor from the vote of any majority, however enlightened, but from the common judgment and consent of the whole body of the people. . . . In other words, no consideration of trial by jury can be adequate which ignores its political and *legislative* significance, and seeks to reduce it to the mere method of finding facts which the passion for logic of judges and lawyers has tried to make it." (Our emphasis.)

During the arguments in the *Fanny Hill* case on December 7, 1965, Justice Black interrogated the Deputy Attorney General of Massachusetts on this point:

> "Mr. Justice Black: Let's get to the core of it. The core of the test is to arouse or stimulate a prurient interest. Who are the experts in that field? . . ."
>
> "Mr. Justice Black: You recognize that that is a test in the Roth case? . . ."
>
> "Mr. Justice Black: I understand that, but you are discussing the question now basically.

It is submitted that a departure from this tradition will place this Court in the unfavorable light occupied by the early American courts at the time of Peter Zenger's trial. In that governmental struggle, the American judiciary fought to retain control of the libel determination.[5] If the May 8th decisions are to stand in their present form history will record this Court as having gone on record as assuming control of the obscenity determination,[6] *for the subject matter in "Spree" and "High Heels" permits no other evaluation.*

"Mr. Cowin: Your Honor, I believe that would put the books into the hands of a more or less legislative determination as to what the community wants or does not want.

"Mr. Justice Black: Maybe that is where it should be, in the legislative branch, if the states have the power to suppress books they consider obscene. . . ."

[5]Clark Gavin, Famous Libel and Slander Cases of History, First Collier Books Edition 1962, New York, N.Y., pages 39 to 62, original copyright 1950 as Foul, False and Infamous.

[6]On this role, Justice Black said in *Kingsley Book v. Regents of the University of New York*, 360 U.S. 684, 690:

"If despite the Constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation. In addition, the Justices of this Court seem especially unsuited to make the kind of value judgment—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case by case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal deliberation by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. . . ."

In the Bill of Rights, Justice Learned Hand warns the judiciary against assuming the role of "Platonic Guardians".[7]

> "Moreover, it certainly does not accord with the underlying presuppositions of popular government to vest in a chamber, unaccountable to anyone but itself, the power to suppress social experiments which it does not approve. Nothing, I submit, could warrant such a censorship except a code of paramount law that not only measured the scope of legislative authority but regulated how it should be exercised."

B. *Insofar as Obscenity May Involve a Mixed Question of Law and Fact, This Court Has a Proper Function.*

To say that obscenity is *primarily* a question of fact for the jury is not to suggest, however, that in every instance such is the case. See Justice Brennan dissenting in *Kingsley Book, Inc. v. Brown, supra.* On the contrary, the Court has a proper role, as does the jury system as the fact finder. As the jury may sometimes overstep its bounds, *United States v. Dennett,* 39 F. 2d 564, so also may a lower court, *People of the State of New York v. Birch, et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing Special Term Judge Shapiro's judgment, which dismissed obscenity indictments in 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (Sept. 6, 1963) without trial. We understand this to mean that there are special lines of demarcation which set apart the function of the Court and the function of the jury.

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[7]Learned Hand, The Bill of Rights, Harvard University Press, 1962, at page 73.

In other words, there is a line of demarcation between material which, because of its redeeming social importance, may be protected *as a matter of law, when employed in the market place of ideas for that purpose,* and other material which has no redeeming social purpose and which is either a question of fact for the jury as the finder of fact, or is obscene as a matter of law. See the reporter's comments to the 1957 draft of the American Law Institute Model Penal Code, Section 207.10 at page 16.

When illustrated by way of example, the dividing line of responsibility is brought sharply into focus. When Justice Brennan speaking on this matter for the majority of the Court in Roth said that, "The portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press," he cited in explanation at footnote 21 a case, the facts of which, in our view, clearly demonstrate the general area in which the Court *properly* plays its role and, concomitantly, what is not a proper area of responsibility for a jury.

In *United States v. Dennett,* 39 F. 2d 564 (Mar. 3, 1930), cited with approval in *Roth* at footnote 21, *the Circuit Court of Appeals for the Second Circuit reversed a jury verdict* that Mrs. Dennett was guilty of the violation of the postal obscenity statute in mailing a copy of a pamphlet "Sex Side of Life" to a married woman, Mrs. C. A. Miles. Mrs. Dennett, the mother of two boys, had authored and published the pamphlet which was designed to explain the sex function to adolescents. The pamphlet is described in detail in the Circuit Court of Appeals opinion at pages 565-567. In

holding the conduct involved to be entitled to constitutional protection, and not to constitute a proper case for submission to the jury, the court said at page 568:

> "In other words, a publication might be distributed among doctors or nurses or adults in cases where the distribution among small children could not be justified. The fact that the latter might obtain it accidentally or surreptitiously, as they might see some medical books which would not be desirable for them to read, would hardly be sufficient to bar a publication otherwise proper. Here the pamphlet appears to have been mailed to a married woman. The tract may fairly be said to be calculated to aid parents in the instruction of their children in sex matters. As the record stands, it is a reasonable inference that the pamphlet was to be given to children at the discretion of adults and to be distributed through agencies that had the real welfare of the adolescent in view. There is no reason to suppose that it was to be broadcast among children who would have no capacity to understand its general significance. Even the court in Regina v. Hicklin, L.R. 3 Q.B. at p. 357, which laid down a more strict rule than the New York Court of Appeals was inclined to adopt in People v. Eastman, 188 N.Y. 478, 81 N.E. 459, 11 Ann. Cas. 302, said that 'the circumstances of the publication' may determine whether the statute has been violated.
>
> "But the important consideration in this case is . . . the meaning and scope of those words of the statute which prohibit the mailing of an 'obscene, lewd or lascivious. . . .' It was for the trial court

to determine whether the pamphlet could reasonably be thought to be of such a character before submitting any question of the violation of the statute to the jury. Knowles v. U.S. (C.C.A.) 170 F. 409; Magon v. U.S. (C.C.A.) 248 F. 201. And the test most frequently laid down seems to have been whether it would tend to deprave the morals of those into whose hands the publication might fall by suggesting lewd thoughts and exciting sensual desires. Dunlop v. U.S., 165 U.S. at page 501, 17 S. Ct. 375, 41 L.Ed. 799; Rosen v. U.S., 161 U.S. 29, 16 S. Ct. 434, 480, 40 L.Ed. 606. . . .

"We have been referred to no decisions where a truthful exposition of the sex side of life, evidently calculated for instruction and for the explanation of relevant facts, has been held to be obscene. . . .

"The defendant's discussion of the phenomena of sex is written with sincerity of feeling and with an idealization of the marriage relation and sex emotions. We think it tends to rationalize and dignify such emotions rather than to arouse lust. While it may be thought by some that portions of the tract go into unnecessary details that would better have been omitted, it may be fairly answered that the curiosity of many adolescents would not be satisfied without full explanation, and that no more than that is really given. It also may reasonably be thought that accurate information, rather than mystery and curiosity, is better in the long run and is less likely to occasion lascivious thoughts than ignorance and anxiety. Perhaps instruction other than that which the defendant sug-

gests would be better. That is a matter as to which there is bound to be a wide difference of opinion, but, irrespective of this, we hold that an accurate exposition of the relevant facts of the sex side of life in decent language and in manifestly serious and disinterested spirit cannot ordinarily be regarded as obscene. Any incidental tendency to arouse sex impulses which such a pamphlet may perhaps have is apart from and subordinate to its main effect. The tendency can only exist in so far as it is inherent in any sex instruction, and it would seem to be outweighed by the elimination of ignorance, curiosity, and morbid fear. The direct aim and the net result is to promote understanding and self-control.

"No case was made for submission to the jury, and the judgment must also be reversed."

The *Dennett* opinion stands in marked contrast to that of Special Term Justice J. Irwin Shapiro in *People v. Birch, supra,* wherein he said at page 528, in holding the material and conduct there involved not to present a factual question for trial:

"The basic question is whether these books go beyond 'the present critical point in the compromise between candor and shame at which the community has arrived'. . . .

"The books here offer. . . . no 'four letter' words. . . . Fully 90% of each book, however, is filled with lurid descriptions of sexual activities, both hetero and homosexual, in sufficient detail to act as an erotic stimulus to those so inclined. However, in all their erotic descriptions they maintain a clever, and apparently deliberate, avoidance of socially unacceptable language, and the descriptions

of erotic activity are so similar, in language and action, as to appear to be written by one author using one outline for all the books. Even those books which have a stronger plot and story line reflect this outline in the description of the sexual scene. Page after page contains details and descriptions of similar erotic behavior. . . :

"In the opinion of the Court (compelled by statute to act as a literary critic) these books are plain unvarnished trash, but novels and stories of no literary merit have a place in our society. There are those who, because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better."

In our view, trial judge Shapior misapplied the obscenity laws and misunderstood the role played by judge and jury in such a case. The Appellate Division of the Supreme Court, Second Department (Brennan, Hill, Rabin, Hopkins and Benjamin) *supra,* in reversing and remitting the matter for trial said as much, at page 754:

". . . we do not agree with the learned Justice at Special Term that these books have sufficient redeeming importance if they furnish escape literature to those who, as he puts it, 'because of lack of education, the meanness of their social existence, or mental insufficiency, cannot cope with anything better.' This much social significance must by definition be inherent in literature which nevertheless has been proscribed by the Supreme Court as 'utterly without redeeming social importance.' "

By analogy and comparison respondent cannot reconcile "Spree" and "High Heels" as presenting a "Dennett" type situation.

C. *"Spree" and "High Heels" Do Not Present an Issue of Law for This Court.*

The weight of evidence (see Point III-D) relegates these publications to the jury classification, no matter how they are "used" (see Point II).

As a "girlie magazine" type "Spree" has in past years been long identified in the reported decisions as being at the bottom of the ladder. See *New Jersey v. Hudson County News Company,* 41 N.J. 247, 196 A. 2d 225, 228, Fn. 2 (Dec. 13, 1963); *Mahon v. Rachleff,* 15 Fla. Supp. 136 (Dec. 17, 1959), aff'd in 124 So. 2d 878 (Nov. 29, 1960); *Comm. Penn. v. Levan,* 52 Berks 160 (Aug. 19, 1960), and *Chobot v. Wisconsin,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15 (Oct. 23, 1961), rehearing denied 368 U.S. 936 (Dec. 4, 1961).

Given an opportunity to argue this issue (for the first time) on a rehearing, respondent submits that it will have no difficulty in laying before this Court an overwhelming amount of similar data to the same effect, gleaned from the records of unreported cases in the hands of other law enforcement agencies throughout the Nation. How can this High Court justify its refusal to respond to the moral demands of the separate communities throughout the Nation?

As noted by Justice Harlan in *Alberts,* the interests which the obscenity statutes protect are primarily matters of state concern, for each state is the primary guardian of the moral standards of its citizens. The great strength of our federal system is that we have, in the 50 states, 50 experimental social laboratories. If a mis-

take is encountered in the New York or California jurisdiction in setting the limits too low (as at hardcore pornography) that is something which can be more readily controlled by government in action (with all of its competing forces) within that state. The social experiment in other states goes on undisturbed. Were this error to be made at the federal level, the corrosion would infect each state within the Union with disastrous results. The recovery there is not so easy to come by.

The Kentucky Jurisdiction—the Arkansas jurisdiction—the New York jurisdiction, each should have the power to control the moral destiny of its own communities. No state government should be forced to accept the girlie magazine or books like "Lust Pool" and "Shame Agent" against the express wishes of its citizenry. To hold otherwise is to "censor" the voice of the community and impair its moral development for by its jury verdict in an obscenity trial, the jury is actually "speaking out" in the constitutional sense. (See Point III at p. 14.)

D. *A Ruling That Girlie Magazines Like "Spree" and "High Heels" May Not Be Prohibited by State Action (if Such Is the Impact of the May 8th Decisions) Finds Little Support, Policy-Wise, in the Supreme Courts of Other States Making Up This Union.*

The overwhelming majority of state high courts (8 out of 9) which have ruled on cases involving girlie magazines have held them to present a jury question. *Connecticut v. Andrews,* 150 Conn. 92, 186 A. 2d 546 (1962); *Monfred v. Maryland* (*supra*); 226 Md. 312,

173 A. 2d 173, cert. den. 368 U.S. 953 (Jan. 8, 1962); *State v. Chobot* (*supra*); *New Jersey v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 (1963); *Goldstein v. Virginia* (unreported); cert. denied 372 U.S. 910 (Feb. 18, 1963); *Kentucky v. Austin*, 386 S.W. 2d 270 (Jan. 22, 1965); *Gent v. Arkansas*, 393 S.W. 2d 219 (May 24, 1965); *Louisiana v. Percy Henry*, ... La. ...., ...So. 2d .... (May 1, 1967) and *City of Hammond v. Glen Connors*, writ of certiorari and review refused in .... La. .... (Mar. 27, 1967) *Cf. People v. Richmond County News Co., Inc.*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681 (1961).

In New York, the only state to hold to the contrary, the result was not convincing. In the *Richmond County News* case (*supra*), the New York Court of Appeals, after a fact-finding by three judges at the trial level and five judges in the appellate division, that the so-called girlie magazine "Gent" (April, 1967) was obscene, reversed in a 4-to-3 decision a judgment of conviction against Richmond County News Company, the local distributor of "Gent" magazine in Richmond County. The majority of four could not agree on the reasoning and cast two separate opinions on the reversal. Justices Fuld and Van Voorhis agreed that the test for New York "obscenity" required more (hardcore pornography) than the test for constitutional "obscenity" of Roth-Alberts. Justices Desmond and Dye agreed that the material was offensive but considered themselves restrained by Roth-Alberts (inferentially that Roth-Alberts required hardcore pornography). Justice Froessel joined by Burke and Foster in a strong 4-page dissent took issue with the majority for adopting a far more stringent test than was required under the present constitutional standard.

Even "Gent", commonly refetred to as the less innocuous "N.Y." girlie type magazine is clearly distinguishable from the subject matter herein. "Spree" and "High Heels" which contain no camouflaging—being 100% an appeal to prurient interest.

The second case to be considered in New York, *Larkin v. G. I. Distributors, Inc.*, 14 N.Y. 2d 869, 252 N.Y.S. 2d 81 (June 10, 1964), involved six of the early California variety: American Art Agency, Inc. (Luros) magazines, Cocktail, Vol. 2, No. 1 (January 1961); Tonight, Vol. 1, No. 5 (November 1960); Show Case, Vol. 1, No. 1 (October 1960); Snap, Vol. 1, No. 7 (December 1960); Touch, Vol. 1, No. 7 (October 1960); Tonight, Vol. 1, No. 5 (November 1960), and a local distributor in the State of New York. In this case Justice Desmond changed his mind and voted them obscene under New York's obscenity statute, undoubtedly because of the difference in nature between "Gent" and the California type girlie magazine. The final result, however, was the same as in the "Gent" case (4-3). A few months before the decision, Justice Bergen replaced Justice Foster and Bergen voted contrary to Foster's vote in the *Gent* case. Dye, Fuld, Van Voorhis and Bergen voted with the majority and Desmond, Burke and Scileppi dissented.

An interesting fact went unnoticed by the prosecutor in the G.I. Distributors' case (which was tried in an injunction proceedings. One of the very magazines under consideration, Touch, Vol. 1, No. 7, was the identical magazine involved in a New Jersey conspiracy conviction and *in that case, the publisher itself had pleaded guilty to the charge.*

One young law student (female) made an astute observation, after considering these results: "How can the subject matter under such divergent thinking be other than a jury question?"

A point which bears emphasis is that made by Justice Fuld in the *Richmond County News* case (*supra*). It was within the power of these state justices in formulating state public policy, to set a standard for the state lower than the common denominator of Roth —that is, to hold girlie magazines protected by state law, though proscribable by the Federal Constitution. This position, however, had only two advocates (Fuld and Van Voorhis) among the Supreme Court Justices of the nine state supreme courts which considered the matter.

IV.

The Statement in the Per Curiam Decision That "in None of the Cases . . . Was There Evidence of the Sort of "Pandering" Which the Court Found Significant in Ginzberg v. U.S., 383 U.S. 463" Is Not Supported by the Record.

While it is true that *Ginzburg's* efforts were exceedingly vocal, at no time did he consider himself as operating outside the law. See *Ginzburg v. United States,* at footnote 9. Nor do we understand Ginzburg to say that proof of pandering must come solely from confessions, admissions against interest, and the like, for as stated by the Connecticut Supreme Court in *Conn. v. Sul,* 146 Conn. 78, 87, 147 A. 2d 686:

> "Knowledge by a book seller of the obscene or indecent character of the magazines possessed by him *can ordinarily be proved only by circumstantial evidence.*" (Our emphasis.)

We understand the business of pandering to be as defined by this Court in *Ginzburg* as "the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers. . . ." The overwhelming weight of appellate courts and juries which have considered the girlie magazine commodity has placed it within that classification. (See Point III-D.) Certainly the format and content of the girlie magazines "Spree" and "High Heels" fit that description.

The evidence is clear that the Paducah community, like the overwhelming majority of other communities in the United States, resented and objected to the appellant's selling girlie magazines and that this fact was brought home to appellant [R. 22-24, 41]. See *Louisiana v. Henry,* ..... La. ..... (May 1, 1967.) It was not a "sometime thing" with appellant—he carried a full line of titles, estimated as being between 25-30. [R. 41.] That it was the community's judgment as a whole and not a particular pressure group has been established beyond dispute by the two jury verdicts to that effect. Compare *Bantam Books Inc. v. Sullivan,* 372 U.S. 58. *Blankenship v. Holding* and *Holding v. Blankenship,* decided by this court May 15, 1967. Any *innuendo* to the contrary in the opinion is not supported by the record.

The covers of the girlie magazines showing pictures of nude or semi-nude females together with the titles of the various issues proclaim the nature of the publications and give notice of the character of the material. *Louisiana v. Henry,* ..... La. ..... (May 1, 1967). No one glancing at the prominent display represented by petitioner's Exhibits 2 and 3 could help be unaware

of the pandering nature of the publications (their interest to prurient interest) and the community had a right to resent it. We consider this latter an assault on public morals which this Court has not considered in treating the philosophy behind the obscenity laws.

It has been held by the highest state courts of several jurisdictions that in regard to obscene girlie magazines or nudist magazines proof of scienter may be found in the covers bearing photographs of nude or semi-nude women so that even the most casual observation or cursory examination could not fail to acquaint the seller with the nature of the contents and character of the material. See *State v. Chobot*, 12 Wisc. 2d 110, 106 N.W. 2d 286 at 291, 292 (1960) involving four girlie magazines, including "Spree". Appeal dismissed for want of a substantial federal question, *Chobot v. Wisc.*, 368 U.S. 15; *State v. Hudson County News Co.*, 41 N.J. 247, 196 A. 2d 225 at 230 (1963) involving five girlie magazines, including "Spree"; *State v. Andrews*, 150 Conn. 92, 186 A. 2d 546 at 552 (1962), involving two girlie magazines *Chicago v. Doe*, 47 Ill. App. 2d 460, 197 N.E. 2d 711 at 715 (1964), involving a girlie magazine; *Nebraska v. Jungclaus*, 176 Neb. 641, 126 N.W. 2d 858 at 862 (1964), three nudist magazines; *Missouri v. Vollmar*, 389 S.W. 2d 20 at 29 (1965), eight nudist magazines. *Lousiana v. Henry*, ... La. ....., May 1, 1967, 11 Girlie magazines. Significant evidence of scienter consisting of "the transparency of the character of the material in question, highlighted by

the titles, covers, and illustrations" was noted by Justice Brennan in *Mishkin v. N.Y.*, 383 U.S. 502.

Petitioner's protestation that he did not know that "Spree" and "High Heels" were in the shop did not establish that fact as a matter of law—it was an issue for the jury to weigh in the light of all of the evidence, including that noted above. See *Louisiana v. Henry*, ... La. ....., May 1, 1967.

The circumstantial evidence in the *Redrup* case was just as strong, but of a different nature. In *People v. Weingarten*, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (June 13, 1966), trial judge Amos S. Basel found the defendant guilty of selling an obscene paperback book "Flesh Worshippers" at 251 West 42nd Street. The judge noted at page 640 that, "Finkelstein who was convicted owned a book shop at 251 West 42nd Street." Two of the shops involved in *Mishkin v. N.Y.*, 383 U.S. 502 (March 21, 1966) were located at 254 West 42nd Street (Publishers Outlet) and 228 West 42nd Street (Midget Book Shop). It would appear that a trial judge and the New York Court of Appeals could take judicial notice of those activities which have acquired a local, even national reputation (like Main Street, Los Angeles, Baltimore St., Baltimore, and 42nd St., New York City). See New York Journal American, October 29, 1963: "The lights were bright early today on 42nd Street between Broadway and Sixth Avenue—one of the seediest strips of real estate in town. The assignment was to see what kind of smut

material could be found in the area. The material was there—and so were the stores. They're not hard to find. There were six on 42nd Street strip—two more in the subway—and many were still open at 2:30 A.M. Most of the places looked the same. They were sooty and there was provocative calendar art on the walls—nudes and semi-nudes—with salacious type jackets and titles lining the stalls."

The *Arkansas* case, involving an injunction, *and a limited record* does not permit an analysis and comparison.

CONCLUSION.

Respondent, in seeking a hearing and argument on the obscenity vel non issue in this petition for rehearing, is at a disadvantage not faced by appellant when he sought a hearing and oral argument on the same issue. There, four votes were needed to grant certiorari. Supreme Court Practice, Stern and Gressman, page 174. Here, a majority vote of the Court is needed. Rule 58 of the Revised Rules of the Supreme Court of the United States. See also, Supreme Court Practice, Stern and Gressman, Sect. 13-6, at page 385.

It would appear, however, that the unusual manner in which this case was decided (as reflected by the majority and dissenting opinions), indicative of a degree of unfairness to petitioner in not permitting argument on the issue upon which the case was decided, the ambiguities presented by the language of the majority opinion and the consequences which will flow there-

from, as more fully noted in the above arguments, warrant this Court's granting a hearing on the obscenity vel non issue on this petition and setting the matter for further argument during the next term. This Court followed just such a procedure in *Time v. Hill,* 384 U.S. 995, reargued on October 18 and 19, 1966.

The procedure followed by this Court in *Ohio v. Jacobellis,* 373 U.S. 901, reargued on April 1, 1964, is precedent for authorizing reargument on the issues involving scienter, presented in the original grant of certiorari.

Respectfully submitted,

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Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

JOHN B. BROWNING,
Assistant Attorney General,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 16

WILLIAM L. AUSTIN,

Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ of Certiorari to the McCracken Circuit Court of McCracken County, Commonwealth of Kentucky.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent's Petition for Rehearing.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc. (Short Title, CDL), an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws.

CDL participated as Amicus Curiae in Support of the Commonwealth of Kentucky, prior to the submission of the case for decision. We submit herewith our Brief Amicus Curiae in Support of the Commonwealth's Petition for Rehearing.

I.

The Result Is an Unconstitutional Abridgement of Rights Retained by State Governments Under the Tenth Amendment.

A. Obscenity Is Primarily a Question of Fact for the Jury's Determination.

The obscenity controversy places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. On the other hand, there is the claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Tenth Amendment to the Federal Constitution.

When in 1957, this Court addressed itself to the problem, it drew the balance between the two conflicting powers which it expressed in the Roth-Alberts test, namely "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." *When such a state of facts exists,* the police power, reserved to state governments by the Tenth Amendment, is operable, and can act to proscribe such material.

In excluding an area of activity from constitutional protection, the Roth Court defined the same in language traditonally understood, by Anglo-Saxon norms, as phrasing an inquiry which poses a jury question. The determination of the "average person" in the "community" is commonly regarded in our jurisprudence as synonymous with a "verdict" under our jury system. In "Obscenity In The Supreme Court" appearing in XL Notre Dame Lawyer 1, the author, in urging that this tradition be retained in the area of obscenity, comments on this principle:

> "The identification of the jury with the community has been a characteristic of juries from their earliest development in the 13th century as quasi-judicial finders of fact; 'the verdict of the jurors is not just the verdict of twelve men; it is the verdict of a pays, a county, a neighborhood, a community. . . . (T)he voice of the twelve men is deemed to be the voice of the country-side, often the voice of some hundred or other district which is more than a district, which is a community. The (royal) justices seemed to feel that if they analyzed the verdict they would miss the very thing for which they are looking, the opinion of the country.' II Pollock and Maitland, History of the English Law 624 (2d ed. 1952)."

and at page 8:

> "The jury is the mechanism provided by the common law for determination of questions involving the presence of absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. . . ."

In *United States v. Kennerley,* 209 Fed. 119 (SDNY 1913) Judge Learned Hand, often referred to as "the father of the modern obscenity law", drew an analogy between the standard of obscenity and the standard of care in negligence trials. At page 121, Judge Learned Hand said:

> "Yet, if the time is not yet when men think innocent all that which is honestly germane to a pure subject, however little it may mince its words, still I scarcely think that they would forbid all which might corrupt the most corruptible, or that society is prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members. If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy.
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste,

the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech." (Our emphasis.)

Judge Learned Hand acknowledged in *Kennerley* that the Court's powers were limited, where at page 120 he said:

"Whatever be the rule in England, in this country the jury must determine under instructions whether the book is obscene. The court's *only power is to decide whether the book is so clearly innocent that the jury should not pass upon it at all.* U.S. v. Clarke (D.C.) 38 F. 500; U.S. v. Smith (D.C.) 45 F. 478. *The same question arises as would arise upon motion to direct a verdict at the close of the case.* Swearingen v. U.S., 161 U.S. 446, 16 S.Ct. 562, 40 L.Ed. 765, did not decide that the court is finally to, interpret the words, but that matter was left open, because the instructions in any case misinterpreted the statute. The question here is, therefore, whether the jury might find the book obscene under proper instructions. . . ." (Our emphasis.)

Speaking for the Circuit Court of Appeals, 2d Circuit, in *United States v. Levine* (1936), 83 F. 2d 156. 157 (cited by Roth at footnote 26 as consistent with the obscenity law expressed therein), Judge Learned

Hand said the following concerning the role of the jury and its determination:

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury* (Rosen v. U.S., supra, 161 U.S. 29, 42, 16 S.Ct. 434, 480, 40 L.Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. There can never be constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors. We mentioned some of these in U.S. v. One Book Entitled Ulysses, supra, 72 F.2d 705; the work must be taken as a whole, its merits weighed against its defects (Konda v. U.S. (C.C.A.7), 166 F.9); if it is old, its accepted place in the arts must be regarded; if new, the opinions of competent critics in published reviews or the like may be considered; what counts is its effect, not upon any particular class, but upon all those whom it is likely to reach. *Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

There is nothing in this case which warrants such a radical departure from traditional notions of Anglo-Saxon jurisprudence.

II.

The Result Reached Is an Unconstitutional Abridgement of the Right of the People to a Jury Trial in Criminal Cases.

At Common Law, the people's interest in a jury trial in criminal cases was equal to that of the defendant. The jury was considered to be an essential part of the judicial machinery. In 1 Hyatt on Trials, at 490 (1924), the author writes:

> "At the common law, and under the earlier American decisions, it was universally held that the accused person in a criminal prosecution could not waive jury trial in any case. The only difference of opinion upon the point was in the reason assigned for this rule. So far as the common law practice is concerned the reason most commonly accepted was that a jury was an essential part of a court having jurisdiction to try such cases, and defendant could no more waive the jury than he could waive any other indispensable part of the judicial machinery. If he plead not guilty, he was thereafter bound to submit himself to trial in the only manner provided. But the rule was early relaxed, in America, at least, and waiver was allowed by mutual consent or in the discretion of the court. It was said that the inviolability clause of the Constitution was for the state's benefit, as well as for that of the accused. In some cases the rule against waiver was put upon the ground of public policy. In the later decisions, under the influence of constitutional and statutory enactments, the common law rule has been widely relaxed, but wherever it

> is followed, and waiver is not allowed, it is almost invariably upon the ground that the Constitution guarantees a common law trial, and there can be no such trial without a jury."

Very recently this Court in *Singer v. U.S.*, 13 L. Ed. 2d 630 considered this issue in depth in the federal area. There, a unanimous Court held at page 638:

> "The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal *which the Constitution regards as most likely to produce a fair result.*" (Our emphasis.)

In the Commonwealth of Kentucky, the people in the State Constitution are entitled to a jury trial in all criminal proceedings. Kentucky Constitution, Section 11. See "Trial Juries and the New Rules—Right to Trial by Jury" in 47 Kentucky L.J. 185.

This being a review of a jury trial in a state court, involves rights arising out of the Seventh Amendment to the Federal Constitution which accords special importance to jury determinations. While this Court will review the findings to analyze the facts in order to pass upon a federal question, *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686, 710 (March 9, 1964), where no constitutional question is shown to be involved, the jury's determination is supreme.

Very recently, this right of the poeple as applied to obscenity prosecutions was squarely ruled upon by the

California Court of Appeal, Second District, Division 2. Judge Herndon, speaking for the court in *People v. Noroff* in a nudist magazine case, 58 Cal. Rptr. 172 (April 13, 1967), said at page 178, in resolving the issue in the people's favor:

> "Although ordinarily it might be regarded as too elementary to deserve specific comment, in the context of the instant appeal it appears appropriate for us to endorse appellant's observation that in this state the right to a jury trial is vested in the People as well as in the defendant (Cal. Constitution, art. 1, Section 7; People v. Spencer, 170 Cal. App.2d 145, 149, 338 P.2d 484, and cases cited). Further, as noted in the Comments to the American Law Institute's Model Penal Code, Tentative Draft No. 6, page 47: 'Jury trial in this field (obscenity prosection) has the merit of requiring unanimous condemnation by this sample of the general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description and representation of sexual matters.' "

Justice Herndon's rule of law should govern in this case. Two Kentucky juries found Austin guilty of the obscenity crime. In view of the nature of the subject matter, those verdicts should remain inviolate.

III.

Considering the Result Reached as Being Solely a Matter of Public Policy, Other Alternatives Should Have Been Weighed in the Balance and Made the Subject of Argument.

If one were to attempt to reconstruct the deliberations of the members of this Court prior to this decision (a feat made difficult by the fact that no briefs or oral argument was had upon the issue which decided the case) one might reasonably conclude that a near majority of the Court favored establishing the mens rea requirement for the retailer obscenity crime at "reckless conduct." See *Mishkin v. N.Y.*, 383 U.S. 502 fn. 9. Certiorari was granted as to *Austin* and *Redrup*, both retailer cases, on Apr. 25, 1967, just 35 days after the *Mishkin* (publisher) decision. This Court had already established "reckless conduct" as a constitutional level in recent cases in other areas. *New York v. Sullivan*, 376 U.S. 254; *Garrison v. Louisiana*, 379 U.S. 64. *Rosen v. U.S.*, 161 U.S. 29, however, imposed a serious barrier in its holding that the mens rea was satisfied if only knowledge of the contents were proved. With no majority decision in sight on this issue (compare *Time v. Hill*, 17 L. Ed. 2d 456, 472 and the manner in which Justices Black and Douglas voted) it does appear as though a majority "backed" into a decision it had no intention of rendering, even as late as Oct. 10, 1967, when the cases were taken under submission.

Under one possible analysis of the *per curiam* opinion, this Court, finding itself unable to reach a clear majority decision on the scienter issue, sidestepped that issue and, instead of proceeding as urged by

Justices Harlan and Clark, decided the case along much the same lines by regarding the "obscenity vel non" issue itself as a concept which partakes of two variable factors: (1) the nature of the materials, and (2) the use to which they are put. See National Decency Reporter Vol. III No. 6 June-July 1966 "Analysis of the Mishkin, Ginzburg and Fanny Hill Decisions." A close inspection of this analysis in relation to a criminal prosecution and the "conduct" principle upon which variable obscenity is predicated and the rationale behind the obscenity crime will demonstrate, however the fallacy of this reasoning.

We think this Court should have entertained further argument on other alternatives, such as the possiblity of recognizing different scienter requirements for publishers and retailers. See *Mishkin v. N.Y.*, 383 U.S. 502 at fn. 10.

This Court might also have considered the rationale recently employed in an obscenity case by an intermediate California appellate court, particularly as the division of materials into 3 classes in that case, related to the *Gent* case and the injunctive process. Logically the injunctive process might be limited to hard-core pornography, described by the Misuraca Court as Class 2 material. The net result would be to nullify the "prior restraint" aspects of *Gent*, while at the same time restoring to the state the means, by way of criminal attack, of lessening the impact of such materials in the community. See *People of the State of California v. Misuraca et al., Appellate Dept. of the Los Angeles Superior Court, C.R.A. 7179*, set forth herein in full at Appendix "A."

IV.

This Court's Limited Concern for Juvenile Laws, Assaults on Individual Privacy and Pandering, Noted in the Per Curiam Opinion Overlooks a Major Concern of the State Courts—the Assault on Public Morality.

Louis B. Schwatz, co-reporter of the Model Penal Code, explains the philosophy of the obscenity crime in "Morals Offenses and the Model Penal Code", appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginzburg v. U.S.*, 16 L. Ed. 2d 31, at page 38, fn 12; page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.*, 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

> ". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstrably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism. . . ."

and at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by law. . . ."

Mr. Schwartz continues at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restraints we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the obscenity, but the *right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*"

In sum, the case for the governmental action taken by the Commonwealth of Kentucky was stated by Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*), at page 502:

> "The State can reasonably draw the inference that over a long period of time the *indiscriminate dissemination* of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . . (our emphasis).

It is the *presence* of the degrading materials which is thought to cause the harm, much like the baudy house of old. *Rex v. Curl* (1727), 2 Strange 788.

The highest courts in 8 out of the 9 states which have had the girlie magazine problem before them have shown a greater concern for the public morals than have the 7 members of this Court who voted in support of the per curiam opinion. See *Wisconsin v. Joseph Chobot,*

12 Wisc. 2d 110, 106 N.W. 2d 286 (Nov. 29, 1960) appeal dismissed for want of a Federal question 368 U.S. 15 (Oct. 23, 1961) rehearing denied 368 U.S. 936 (Dec. 4, 1961) involving four girlie magazines; "Spice", "Adam", "Spree" and "Blondes, Brunettes and Redheads"; *Harry Monfred et al. v. Maryland,* 226 Md. 312, 173 A. 2d 173 (Aug. 9, 1961) involving five girlie magazines "Candid", "Consort", "Sextet," "Cloud 9" and "Torrid"; *Arthur Goldstein v. Virginia* (unreported), writ of certiorari denied 372 U.S. 910 (Feb. 18, 1963); *Connecticut v. Joseph S. Andrews,* 150 Conn. 92, 186 A. 2d 546 (Nov. 6, 1962) involving two girlie magazines "Modern Man—1960 Yearbook of Queens" and "Modern Man"; *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 228 fn 2 (Dec. 16, 1963) involving five girlie magazines: "Mermaid", "Spree" "Exotic Adventures", "Sir Knight" and "Ace"; *Kentucky v. Austin,* .... Ky. ...., 386 S.W. 2d 270 (Jan. 22, 1965) involving two girlie magazines "Spree" and "High Heels"; *Gent et al. v. Arkansas,* 393 S.W. 2d 219 (May 24, 1965) involving eight girlie magazines: "Cavalcade", "Gentlemen", "Ace", "Sir", "Gent", "Swank", "Modern Man" and "Bachelor"; and *Louisiana v. Percy Henry,* ..... La. ..... (May 1, 1967), involving eleven girlie magazines: "Gem", "Carnival", "Rogue", "Sir", "Ace", "Caper", "Jaguar", "Gent", "Wildcat", "Sir Year Book" and "Nuggett". The only state high court to disagree, did so by a narrow 4-3 majority and not without disagreement between the majority judges who could not agree upon a majority opinion. See CDL Commentaries on the Law of Obscenity Vol. 1 No. 2 at pages 1-16.

But then this is only natural, for state governments have a special concern here, for "the domain of sexual

morality is pre-eminently a matter of state concern", Justice Harlan concurring in *Alberts v. Calif.*, 354 U.S. 476, 502. We think Justice Harlan was correct when he said at page 501:

> "In judging the constitutionality of this conviction, we should remember that our function in reviewing state judgments under the 14th Amendment is a narrow one. We do not decide whether the policy of the state is wise, or whether it is based upon assumptions scientificially substantiated. We can inquire only whether the state action so subverts the fundamental liberties implied in the Due Process Clause that it cannot be sustained as a rational exercise of power. . . ."

Until *Austin* and *Redrup,* we had thought this Court's decisions in obscenity cases during the years 1957-1964 to have recognized the special public policy favoring the obscenity laws and to have been in support of criminal prosecution by the states of those dealing in obscenity. See Brief Amicus Curiae of Citizens for Decent Literature Inc., filed in *A Book Entitled Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts,* 383 U.S. 413. With this Court's opinion in *Redrup-Austin-Gent,* our convictions have suffered.

We had thought that Chief Justice Warren was in agreement that such criminal matters were properly within the domain of state governments and the individual communities. See Chief Justice Warren dissenting in *Ohio v. Jacobellis,* 378 U.S. 184, 202. It was during arguments in *A Quantity of Books v. Kansas,* 378 U.S. 205 in April of 1964 that the Chief Justice sharply re-

buked Attorney General Ferguson of Kansas (as reported in the Los Angeles Times in April 1964):

> "Warren then asked; 'why don't law enforcement officers do their jobs?' He said there was 'not a city in this country' where pornography is not sold with impunity.
>
> "It would be simplier to prosecute sellers of pornography under the Kansas obscenity law, and after a conviction it would then be easy to prevent circulation of the books as well, Warren asserted.
>
> "He suggested that the state did not follow this procedure because its easier to burn books than it is to prosecute a seller of obscenity."

The Chief Justice's vote on May 8, 1967 in *Austin and Redrup* fails to give support to his advice given the Kansas Attorney General 3 years earlier.

At various times, other justices have indicated views entirely at odds with their vote in these cases. See Justice Brennan speaking for the majority in *Roth v. Alberts,* 354 U.S. 476 at 490, and dissenting in *Kingsley Book Inc. v. Brown,* 354 U.S. 436; Justice Stewart's opinion in *Volanski v. U.S.,* 246 F. 2d 842, 845 and Justice Black's opinion in *Kingsley Corp. v. Regents of Univ. of New York,* 360 U.S. 684, 690.

In our reappraisal we are forced to conclude that this Court does not have a clear understanding of the practical effect of its multi-faceted, esoteric opinions on the rulings of the trial judges, the prosecutors efforts under the law and the continuing struggle of the communities to halt the moral erosion and the sagging standards of sexual morality within the community.

For example, the separate opinion of Justices Brennan, Warren and Fortas in the *Fanny Hill* case was the signal for the industry to unload the classical examples of pornography on the markets in the communities (the so-called "classics")—plain, unadulterated hard-core pornography in the simplest form. Typical of this are the many versions of "My Secret Life" and "The Complete Marquis de Sade" published by Holloway House. The prosecutors were and are frozen in fear at the implications of the separate opinion of the three justices.

Before the ink was dry, the *per curiam* opinion in *Redrup-Austin-Gent* had an adverse effect upon the trial of an obsenity case in San Diego. A news clipping from the San Diego Union of May 13, 1967, reporting on the trial of *People v. Effie,* is included herein as Appendix A. In a phone conversation, Deputy City Attorney Shain B. Haug, who tried the case, stated that the news account was substantially correct and gave the following additional facts:

Effie's is a relatively smaller liquor store fronting on Broadway in San Diego. About ½ to ¾ of the space is devoted to magazine racks, wall racks for paperbacks and magazines. The bulk of this material is sex oriented (nudist magazines, bondage materials, sex paperbacks etc.). The obscenity charge involved eight publications: "International Nudist Sun", Vol. 1 # 5, "Muscleboy" Vol. 2 #4 (June, July 1966), "Butch" Issue 4, "Male Nudist Portfolio" #5, Booklets—"Paul in Bondage", "Roommates Judo Lesson", "Susie's Sisterly Spanking", and "Leather Loving Lena." The arrest was made on April 12, 1966.

The trial commenced on Wednesday May 3 and by Friday May 5 the jury was selected. On Monday May 8, the prosecutor put on his case in chief including testimony on two sales and the execution of a search warrant. Two articles had been purchased, International Nudist Sun, Vol. 1 #5 and Muscleboy. Based upon the personal observations of police and prosecutor, a search warrant naming the six other items was sought, issued and executed. Thereafter the people showed the facts surrounding the arrest, a physical description of the premises, a diagram of the premises, 12 photographs of the premises, identification as to where each of the books was picked up, demonstration of how the magazines were wrapped in plastic bags, the testimony of a psychologist on the effect of the material and its appeal to prurient interest, and testimony of a man with a master's degree in journalism and English on limits of candor and social importance. The materials were then read into the record. On Tuesday May 9th the reading was continued. At 2:00 P.M. the news accounts of this Court's decisions were discussed by the court and counsel, and the matter was continued to Friday.

On Thursday, the opinion in *Redrup-Austin-Gent* was made available through C.C.H. Supreme Court Bulletin and oral arguments had thereon. The prosecutor argued that pandering could be shown by other types of circumstantial evidence, such as the officer's description of the display for sale and the photographs thereof, the psychologists evidence as to the appeal of the matter to prurient interest and the expert testimony on limits of candor and social importance. Further, the prosecutor argued that Redrup and Gent and Austin

should be considered only to be a disposition of the matter which was before the Court.

The Court ruled that where a retailer was tried for the sale of material which was not clearly hard-core pornography, the people had to prove during their case in chief substantial evidence of pandering and that mere display for sale did not meet the requirement of substantial evidence of pandering. Judge Curran ruled that anything less than the *Ginzburg* type of solicitation —even if of a different character—was not substantial evidence of pandering and that since the retailer had not given out circulars or advertised pornography for sale, the people's case was not sufficient.

The people made the above offer of proof on pandering and rested. The defendant put on no case and the parties were allowed to argue to the jury. The Court instructed the jury to acquit under Penal Code Section 1118 which reads:

> "If at anytime after the evidence on either side is closed, the Court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury are not bound by the advice."

The prosecutor asked for an instruction under Ginzburg that the jury could consider pandering, *i.e.*, how the purveyor treated the material in reaching their conclusion on the obscenity of the matter. Judge Curran held that the law no longer was primarily concerned with the obscenity of the material—in other words—the prosecution was no longer for the sale of obscenity, but was now for the active solicitation of sales.

After two hours the jury was undecided at 9-3 for conviction and asked for further instructions on what is insufficient evidence as that term applied to pandering evidence. After another hour, they stood at 7-5 for conviction and asked for further instructions. The Court then instructed them that if the defendant was found guilty and the case were appealed, the conviction would be reversed. It then took the jury 45 minutes after that to return a not guilty verdict.

From the above practical example of what can be expected to occur throughout the nation as a result of these decisions, we think a rehearing is in order, if only to clarify the mistaken interpretation that this Court's reference to "an assault upon individual privacy" and its citation of *Public Utilities Commissioner v. Pollak*, 343 U.S. 451 was meant to qualify the philosophy of the obscenity laws expressed in "Morals Offenses and The Model Penal Code." (*supra*).

Were such a qualification to exist under the Law, a community would be unable to proscribe a baudy house in a residential community.

Conclusion.

The case should be ordered restored to the docket for reconsideration by way of briefing and further argument of the matters of law discussed in the *per curiam* opinion of May 8, 1967.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
RAY T. DREHER,
Counsel for Amicus Curiae.

APPENDIX "A".

Memorandum Opinion and Judgment.

Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Appellant, vs. Lawrence S. Misuraca, etc., Defendant and Respondent. Superior Court No. CR A 7179. Trial Court No. M-25081.

Appeal by People from order of dismissal, of the Municipal Court of the Los Cerritos Judicial District, John C. Landis, Judge. Reversed.

For Appellant—Evelle J. Younger, District Attorney. Harry Wood, Deputy District Attorney, Harry B. Sondheim, Deputy District Attorney.

For Respondent—Stanley Fleishman, Esq.

Upon motion by defendant at a pre-trial hearing the trial court dismissed counts I, II and III of the complaint charging violations of § 311.2 Penal Code on the ground that the three named books ("Sexpionage," "Black is for Bliss" and "The Naked Archer") were not obscene.

Inasmuch as the case is being sent back for further proceedings in the trial court, we shall set forth our analysis of some of the substantive and procedural questions which govern both our present ruling and the problems which may arise if the motion to dismiss is renewed in the trial court. Except where otherwise indicated, this analysis is based on the following cases: *Roth v. United States* (1957) 354 U.S. 476 [1 L.ed.2d 1498]; *Jacobellis v. Ohio* (1964) 378 U.S. 184 [12 L.ed.2d 793]; *Zeitlin v. Arnebergh* (1963) 59 Cal. 2d

901; *Ginzburg v. United States* (1966) 383 U.S. 463 [16 L.ed.2d 31]; *Mishkin v. State of New York* (1966) 383 U.S. 502 [16 L.ed.2d 56]; and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts* (1966) 383 U.S. 413 [16 L.ed.2d 1] [hereinafter referred to as the *Fanny Hill* case].

To the extent that the California definition of obscenity may be more stringent than that required by the United States Supreme Court decisions, we are guided by *Zeitlin*.[1]

A. With respect to what is obscene[2] we shall in this memorandum arbitrarily divide all such matter[3] into three general classes, for convenience of reference only.

---

[1]The California Supreme Court in *Zeitlin* held that the California statutory definition (§ 311 (a) Penal Code) applied only to "hard-core pornography". The United States Supreme Court in *Mishkin* after noting that the New York courts also adopted the "hard-core pornography" test stated that it is "more stringent than the *Roth* definition". (16 L.ed.2d 56 at 61.)

[2]The standard constitutional definition of obscenity is that set forth in *Roth*. Such definition as brought down to date and stated in the *Fanny Hill* case is as follows: "We defined obscenity in Roth in the following terms: 'Whether to the average persons, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US, at 489, 1 L ed 2d at 1509. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." (16 L.ed 2d at pp. 5-6.)

Originally "utterly without redeeming social value" was not part of the definition but was descriptive of the material which otherwise met the definition. Now it is part of the definition itself.

[3]"Matter" is defined in § 311 (b) Penal Code.

Class 1. This is matter which is not obscene per se and which never could be classed as obscene regardless of its commercial exploitation as such. It includes the great mass of books and pictures generally read and seen by the public.

Class 2. This consists of that which is obscene per se without any additional showing of commercial exploitation as such. In California under *Zeitlin* this would apply to hard-core pornography only.[4]

Class 3.[5] This includes matter which falls short of being in the second class per se but which may become so by reason of its commercial exploitation as such. It should be noted that the United States Supreme Court in developing this rule in *Ginzburg, Mishkin* and the *Fanny Hill* cases did not change the definition of

---

[4]Examples of hard-core pornography are set forth in footnote number 3 to the dissenting opinion of Mr. Justice Stewart in *Ginzburg* as follows: "'. . . Such materials include photographs, both still and motion picture, with no pretense of artistic value, graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism, and sometimes involving several participants in scenes of orgy-like character. They also include strips of drawings in comic-book format grossly depicting similar activities in an exaggerated fashion. There are, in addition, pamphlets and booklets, sometimes with photographic illustrations, verbally describing such activities in a bizarre manner with no attempt whatsoever to afford portrayals of character or situation and with no pretense to literary value. All of this material . . . cannot conceivably be characterized as embodying communication of ideas or artistic values inviolate under the First Amendment. . . .'" (16 L.ed.2d at 54.)

[5]No Supreme Court decision has yet applied this rule in California and it might be argued that because of the more stringent hard-core pornography definition it has no application here. However, *Mishkin* arose in New York, which has the same hard-core pornography rule and this was noted by the United States Supreme Court in deciding *Mishkin*. We see no reason why it should not apply here, particularly since the rule does not purport to change the definition of obscenity, but deals with evidence. *Zeitlin* did not decide it, because there the book only was on trial.

obscenity but merely held that additional evidence of commercial exploitation by the defendants could be considered in establishing that the material meets the definition.[6]

B. *The difference between the Ginzburg type of evidence and that which has always been received to establish the obscene character of the book.*

To assist the jury and judge in distinguishing between the first two classes, it has been customary to call expert witnesses with respect to the "redeeming social value" and the customary standards in the community and the other issues embraced in the definition. This evidence prior to *Ginzburg* related to the book and to the public and not to the commercial exploitation by the defendant. Prior to *Ginzburg,* generally the book rather than the man was on trial. The problem was whether the book was obscene per se, and therefore not protected, and the evidence was to assist in the determination of such "constitutional fact", i.e., whether the material fell within the first or second class.

Since *Ginzburg,* which recognized the third class, such evidence continues to be just as material and just as important in deciding the "constitutional fact" issue. But, in addition, an entirely new and fundamentally different kind of evidence is to be received and considered. The man, rather than the book, is on trial.

---

[6]It is not material to our present lawsuit but to make the classifications complete, there is a fourth class (the converse of the third class) consisting of material normally within class 2 but with respect to which defendants have a defense to prosecution if they have exploited the material within medical, psychiatric and other similar groups only and have made no appeal to their prurient interest. This is suggested by both *Ginzburg* and *Mishkin,* and see § 311.8 Penal Code.

Through evidence of the defendant's commercial exploitation of the book, his own evaluation of the material, and his own efforts in appealing to particular groups of society, the finder of facts gets a deeper insight into just what the defendant is selling.[7]

Such evidence was not discussed in the majority opinions of the United States Supreme Court prior to *Ginzburg* but it had been anticipated in the concurring opinion of Mr. Chief Justice Warren in the *Roth* case when he said (1 L.ed.2d 1498 at 1513): "But there is more to these cases. It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." The latter part of that statement is quoted in the majority opinion in *Ginzburg* (16 L.ed.2d at 40-41).

Also this type of evidence was foreshadowed by the State Supreme Court in *Zeitlin* when it compared the "constitutional fact" evidence with the "historical fact" evidence, the former being evidence of the "character of the material involved" and the latter being evidence of "what happened". (59 Cal.2d 901 at 910.)

---

[7]The evidence of commercial exploitation has a bearing on several issues in the case. In the *Fanny Hill* case the principal problem related to the "utterly without redeeming social value" issue. The case held that such evidence was material to this issue. In *Mishkin* (16 L.Ed.2d 56 at 62) it was applied to the "prurient appeal" issue and the court went even further with respect to that issue stating that the prurient appeal can be measured by its appeal to "its intended and probable recipient group". In *Ginzburg* it was applied to the three main issues: (1) prurient appeal, (2) offensiveness, and (3) social importance. (16 L.ed.2d at 38.)

Since the evidence of commercial exploitation is "historical fact" rather than "constitutional fact" evidence as defined in *Zeitlin*, in our opinion it is not the type of evidence which the trial judge weighs in arriving at his independent judgment of the constitutional fact. It is not a matter of book censorship but trial and punishment for conduct of the person. It may result in the conviction of a defendant for selling a book with respect to which another defendant is acquitted. This not only could happen in different parts of the United States but in the same court on the same day with the same jury. And there would be no inconsistency.

Thus, evidence of commercial exploitation should not be received at a pre-trial hearing or any other hearing at which the judge is entertaining a motion to dismiss. It should be presented to the jury during trial and evaluated by the judge only when it becomes necessary to ascertain if as a matter of law it is sufficient. That is, it is like any other evidence received to resolve an issue of fact.

C. *When and how the trial judge should make his independent ruling on the constitutional fact.*

When the book is clearly in class one and this is disclosed by the complaint, the problem can be reached before trial by demurrer. The People so concede, but point to the lack of any statutory authority for a motion to dismiss at that time (or any later time). The People do concede that the decisions require the trial judge to make an independent determination of the "constitutional fact" at some time before judgment but point out that it would fit into normal statutory procedure to do so at the motion for new trial. However, if the constitutional fact issue is determinated by the

trial judge in favor of the defendant, the case should not be re-tried but should be dismissed. Thus even though there is no statutory authority for ruling on a motion by defendant to dismiss, it is a matter of constitutional necessity. Furthermore if this procedure is followed, § 1466 (1) (b) Penal Code preserves to the People the right of appeal.[8]

While it is true that the trial judge has no duty to make his independent ruling earlier than at the time of hearing the motion for new trial, if he does so at a pretrial hearing in order to shorten the trial, and if we concur with his independent ruling on the constitutional issue, a reversal would accomplish nothing except waste the time of the defendant, the prosecutor and the trial court.

On the other hand if the People announce there will be evidence of commercial exploitation, it would normally be an idle act to hear and rule upon the motion to dismiss until after all the evidence has been presented to the jury, probably at the time of motion for new trial. It should be noted that the new trial motion itself may present a similar issue, but, if it is desired to dismiss rather than grant a new trial, it would be preferable to require an express motion to dismiss. This clearly would preserve the right of appeal (*People v. Finch* (1953) 119 Cal.App.2d Supp. 892), although "prodding" by counsel for defendant to rule on the constitutional issue might be a sufficient waiver without the formal motion. Whether passing upon the motion for

[8]Because of differences in code sections regarding appeals from superior court decisions, different procedures may be necessary in that court, as argued by the People, but that does not require us to abandon a workable procedure here.

new trial or a motion to dismiss, the evidence of commercial exploitation should be treated like other factual evidence.

The existence of evidence of commercial exploitation does not eliminate the need to make an independent determination of the constitutional fact. Even where there is such additional evidence, it may be insufficient as a matter of law or the book may be so clearly not obscene that no amount of commercial exploitation could result in conviction. In any case the determination of the constitutional question may result in dismissal.

Once the problems are analyzed the ruling in the present case is apparent. The books are in the third class. Ruling at the pre-trial stage was improper since (1) there was some evidence of the *Ginzburg* type (the covers, inside and out, front and back, of each book), and (2) the People did not stipulate that there would be no *Ginzburg* type evidence presented at the trial. The ruling deprived the People of a jury trial on an issue of fact and we must reverse.

The order of dismissal is reversed.

March 10, 1967.

/s/ Smith
Judge*

We concur:
/s/ Meyer
Acting Presiding Judge
/s/ Whyte
Judge

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*Retired superior court judge assigned by Chairman of the Judicial Council.

San Diego, Calif
Union
(Cir. D. 111,303 Sun. 213,743)

MAY 13 1967

Allen's P.C.B. Est. 1888

Woman Free In Obscenity Case Trial

By MITCH HIMAKA

A Municipal Court jury yesterday found a downtown liquor store owner innocent in an obscenity case involving material which jurors later described as "pure filth."

The jurors after the trial said they felt they had no alternative but to find the woman innocent on the basis of Judge Richard J. Curran's interpretation of Monday's Supreme Court decision.

The defendant was Mrs. Doris Effie, 63, of 666 San Elijo St. She operates Effie's Liquor Store, 636 W. Broadway.

HIGH COURT DECISION

Curran resumed the trial yesterday after calling for a recess to study the Supreme Court's decision handed down Monday.

Deputy City Atty. Shain B. Haug said he had two more witnesses to call to testify, but Curran halted further testimony. He heard arguments from Haug and defense attorney James Marinos and then advised the jury to return a verdict of acquittal.

Curran said he based his advice on the grounds of insufficient evidence.

The jury, despite the advice, deliberated almost four hours before reaching a decision.

BUTLER CONCERNED

City Atty. Ed Butler, informed of the verdict, expressed concern over Curran's action.

"We are concerned that the court did not permit the people to go forward with the presentation of all of the evidence," he said.

"As we read the law, we are entitled to put before the jury all of the evidence on obscenity and pandering that we have. For the court to cut off our case before we have a chance to complete the case, we think, is a miscarriage of justice.

"Certainly in this difficult field of controlling obscenity, we feel the people as well as he defendant are entitled to a ull, complete hearing.

"We think it is a clear error of law on the part of the udge," Butler continued. "However, this will not deter us rom continuing our efforts to prosecute obscenity matters."

CALLED ERROR

Mrs. Effie was charged with eight counts of selling or distributing obscene matter. All of the items involved magazines of male and female nudes, sadism and masochism, Haug said.

A female juror said she thought the pictures were "pure filth."

She said the biggest question, under the recent court decision, involved the pandering or soliciting of customers.

The Supreme Court, in reversing three obscenity cases, ruled that in none of the cases was there evidence of pandering.

JURY INSTRUCTED

Curran, in giving instructions to the jury, said that in order to find the defendant guilty of the crime". . . you must find that the defendant has been guilty of pandering. Pandering is solicitation of customers by appealing to their prurient interests."

"We wanted to find her guilty but under that interpretation, what else could we do?" a juror asked.

She said the jury in the first poll stood 9-3 for conviction and later, after receiving further instruction, 7-5 for conviction. The jury then requested further instruction and finally brought in the acquittal verdict.

Attorney Marinos, following the verdict, asked some of the jurors if they thought the pictures were obscene.

Several of the women jurors answered, "Yes. They were pure filth."

"I'm so upset, I could cry," another woman said as she walked away.

Butler said his office will review the case further.

APPENDIX "B".

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 50

GENT, ET AL., APPELLANTS,

vs.

ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS

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[fol. 2]

IN THE CHANCERY COURT
OF JEFFERSON COUNTY, ARKANSAS
FIRST DIVISION

No. 35013

STATE OF ARKANSAS, Plaintiff,

vs.

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR MAGAZINES, and JOHN NICKELL and W. E. BURNHAM, JR., Defendants.

COMPLAINT

Comes the State of Arkansas by E. W. Brockman, Jr., Prosecuting Attorney for the Eleventh Judicial District of which Jefferson County, Arkansas, is a part, and for petition states:

That Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace, and Sir Magazines are being distributed and sold in Jefferson County, Arkansas, and there is probable cause to believe that the contents thereof are of an obscene nature as defined by Sec. 41-2715 of the statutes of Arkansas; that all of said magazines contain pictures of women in various conditions of dissarray and there is probable cause to believe that stories and articles therein appeal to a prurient interest.

That a copy of Gent magazine, published by PAR Particulars, Inc., 270 Madison Avenue, New York 18, New York, is hereto attached and marked Exhibit "A" to this petition.

That a copy of Swank magazine, published by Royal Publications, Inc., 26 West 47th Street, New York 36, New York, [fol. 3] is hereto attached and marked Exhibit "B" to this petition.

That a copy of Modern Man magazine, published by Copyright Publishers' Development Corp. 8150 North Central Park Avenue, Skokie, Illinois, is hereto attached and marked Exhibit "C" to this petition.

That a copy of Bachelor magazine, published by Magtab Publishing Corp. 509 Fifth Avenue, New York 17, New York, is hereto attached and marked Exhibit "D" to this petition.

That a copy of Cavalcade Magazine, published by Skye Publishing Co., Inc., 505 Eighth Avenue, New York 18, New York, is hereto attached and marked Exhibit "E" to this petition.

That a copy of Gentleman magazine, published by Bruce-Royal Publishing Corp., Division Street, Derby, Conn., is hereto attached and marked Exhibit "F" to this petition.

That a copy of Ace Magazine, published by Four Star Publications, Inc., 509 Fifth Avenue, New York 17, New York, is hereto attached and marked Exhibit "G" to this petition.

That a copy of Sir magazine, published by Volitant Publishing Corp. 21 West 26th Street, New York 10, New York, is hereto attached and marked Exhibit "H" to this petition.

That from an examination of said exhibits, there is reasonable grounds and probable cause to declare said magazines and contents thereof as obscene.

That the name of the seller of said magazines and his address, is John Nickell, 600 West 23rd, Pine Bluff, Arkansas, and the name and address of the distributer in [fol. 4] Jefferson County, Arkansas, is William E. Burnham, Jr., 1326 South Cherry Street, Pine Bluff, Arkansas.

Wherefore, petitioner prays that the magazines described in the complaint herein be declared obscene; that the respondents be enjoined and restrained from selling, exhibiting or commercially distributing any of said magazines or giving away or offering to give away said magazines, or possessing any of said magazines with the intent to sell or commercially sell or give away or offer to give away any of said magazines and that further, any and all of the above

said magazines now in the custody of the respondents should, under proper orders of this Court, be surrendered, seized and destroyed and for all other general and proper relief.

E. W. Brockman, Jr., Prosecuting Attorney, Eleventh Judicial District.

Duly sworn to by E. W. Brockman, Jr., jurat omitted in printing.

[fol. 5] (Exhibits attached to Complaint withdrawn and introduced at the trial.)

Summons issued on the following:

John Nickell

W. E. Burnham, Jr.

Issued: February 4, 1964

Served: February 5, 1964

[fol. 6]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

ORDER TO SHOW CAUSE—February 5, 1964

Now on this day comes on this cause to be heard, the State of Arkansas appearing by E. W. Brockman, Jr., Prosecuting Attorney for the Eleventh Judicial District of which Jefferson County is a part, and from the petition with the exhibits attached thereto, and from other matters and things before the Court, the Court finds:

That the Court has personally examined and perused the contents of the following described magazines and there is

[File endorsement omitted]

probable cause to believe that the contents of the above described magazines are obscene and that the respondents should be required to show cause why said magazines should not be adjudicated obscene.

It Is Therefore by the Court considered, ordered and adjudged that the respondents, Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, John Nickell and W. E. Burnham, Jr., be, and they are hereby ordered and directed to show cause why said magazines should not be declared obscene, on or before the 9:30 a.m. [fol. 7] 12 day of March, 1964.

The Sheriff of Jefferson County, Arkansas, be, and he is hereby ordered and directed to serve a copy of this order and a copy of the Complaint upon the resident respondents notifying them of the pendency of the petition and the date of the hearing to show cause and that he shall make due return thereof and proof of service thereon showing service for the time and in the manner prescribed by law upon the resident respondents; and a copy of this Order and a copy of the Complaint shall be mailed to the non-resident respondents by certified mail.

Joseph Morrison, Circuit Judge.

This the 5 day of February, 1964.

[fol. 8]

IN THE CHANCERY COURT OF JEFFERSON COUNTY,
FIRST DIVISION

No. 35013

[Title omitted]

SEPARATE ANSWER OF JOHN NICKELL AND W. E. BURNHAM, JR.—Filed February 21, 1964

Come the defendants, John Nickell and W. E. Burnham, Jr., by their attorney, Jay W. Dickey, and for answer to the complaint filed herein, state:

[File endorsement omitted]

They admit that they are distributing and selling magazines bearing the titles of Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir. Said defendants state that because the magazines were sent to them by Second Class Mail, it is to be presumed that the United States Government found said magazines not obscene, and defendants, therefore, felt free to distribute and sell the same.

Said defendants further state that they will gladly and without objection abide by the ruling made by this court in regard to whether or not any or all the above-named magazines are obscene, and will discontinue the distribution and sale of the magazines, if any, which the Court declares to be obscene.

Defendants specifically deny that all magazines bearing the above titles now held by these two defendants should be seized and destroyed, which would result in a monetary [fol. 9] loss to said defendants, and state that they should be allowed to withdraw and return to the publishers all magazines found to be obscene in nature, if in fact, any are found to be obscene.

Wherefore, defendants John Nickell and W. E. Burnham, Jr., pray that this court enter an order directing what action they shall follow in regard to the above magazines, and for all other equitable relief.

Jay W. Dickey, Attorney for John Nickell and W. E. Burnham, Jr.

Duly sworn to by John Nickell, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 12]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

STATE OF ARKANSAS, Plaintiff,

vs.

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, and JOHN NICKELL and W. E. BURNHAM, JR., and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., COPYRIGHT PUBLISHERS' DEVELOPMENT CORP., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO., BRUCE-ROYAL PUBLISHING CORP., FOUR STAR PUBLICATIONS, INC., and VOLITANT PUBLISHING CORP., Defendants.

RESPONSE OF GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, AND PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., COPYRIGHT PUBLISHERS' DEVELOPMENT CORP., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO., BRUCE-ROYAL PUBLISHING CORP., FOUR STAR PUBLICATIONS, INC., AND VOLITANT PUBLISHING CORP.—Filed March 11, 1964

Respondents, Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, and Par Publications, Inc., Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., are magazines and corporations incorporated by laws of states other than the State of Arkansas. Each corporation publishes the [fol. 13] magazine attributed to it in the Complaint. Each denies, on behalf of itself and the magazines it publishes,

[File endorsement omitted]

that there is probable cause to believe the stories and articles therein appeal to a prurient interest; denies that there are reasonable grounds and probable cause to declare each of said magazines and the contents thereof to be obscene.

In further response, each of the respondents named above alleges that Act 261 enacted by the General Assembly of the State of Arkansas in 1961 is void for the following reasons:

(a) The said Act is violative of the First and Fourteenth Amendments to the Constitution of the United States, in that it abridges freedom of speech and of the press, and deprives respondents of their property without due process of law.

(b) The said Act is violative of Article II, Section 6, of the Constitution of the State of Arkansas in that it deprives respondents of liberty of the press and a free communication of thoughts and opinions, and is violative of Article II, Section 8, in that it deprives respondents of their property without due process of law.

(c) The said Act, in its definition of the word "obscene," is too vague to put respondents on notice as to what published material is banned by its provisions, and is violative of the due process clause of the Fourteenth Amendment to the United States Constitution. It establishes as a test for obscenity "contemporary community standards" when the [fol. 14] First and Fourteenth Amendments to the Constitution of the United States require nation-wide standards.

(d) It authorizes the banning of publications on the basis of containing matter other than "hard core pornography," as that phrase is used in the interpretation of the First and Fourteenth Amendments to the Constitution of the United States by the Supreme Court of the United States.

The action of this Court in forcing respondents to trial on the return date of the Order to Show Cause is arbitrary and unreasonable and deprives them of a fair opportunity

to present witnesses whose testimony would show that there is no obscenity in said publications when tested against nation-wide standards, which is requisite if published matter is to be banned in a proceeding which is not violative of the First and Fourteenth Amendments to the Constitution of the United States; and of the opportunity to prepare and present other testimony essential to the vindication of their rights, all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, respondents pray the Court to grant a reasonable time to prepare for a hearing, that on hearing the Complaint filed herein be dismissed, and for all proper relief.

Edwin E. Dunaway, Robert C. Downie, 1610 Tower Building, Little Rock, Arkansas.

[fol. 24]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

AMENDMENT TO COMPLAINT—Filed March 25, 1964

Comes the State of Arkansas, by E. W. Brockman, Jr., Prosecuting Attorney of the Eleventh Judicial District, and for his Amendment to Complaint states:

That in order to specifically mention and set out the pictures, articles and cartoons which are allegedly obscene, petitioner states that the following articles, pictures and cartoons are of a purient (sic) and obscene nature:

Gent Magazine, February, 1964, issue: Pictures at pages 2, 10, 11, 12, 13, 20, 21, 31, 37, 38, 39, 63, 64, 65; Articles at pages 33, 35, 55, 47, 48, 49; calendar at page 30.

[File endorsement omitted]

Swank Magazine, March, 1964, issue: Pictures at pages 2, 4, 25, 26, 27, 28, 34, 35, 36, 37, 38, 39, 40, 54, 55, 56, 57; Articles at pages 7, 11, 29, 48.

Modern Man, February, 1964, issue: Pictures at pages 18, 19, 20, 28, 29, 30, 31, 32, 33, 41, 42; Articles at pages 15, 16, 17.

Bachelor Magazine, March, 1964, issue: Pictures at pages [fol. 25] 2, 8, 15, 16, 17, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 40, 41, 42, 43, 48, 49, 50, 51, 55, 56, 57, 61, 62, 63, 66, 67; Articles at pages 6-7, 12-15, 21-22, 81, 82, 31, 28-30, 44-46, 58-60, 81.

Cavalcade Magazine, February, 1964, issue: Pictures at pages 2, 12, 13, 14, 22, 23, 24, 25, 37, 38, 48, 49, 52, 53, 54; Articles at pages 6, 7, 59, 8, 9, 33.

Gentleman, April, 1964, issue: Picture on cover and at pages 2, 7, 9, 10, 11, 30, 31, 32, 34, 35, 52, 53, 55, 56, 57, 58; Cartoon at page 15.

Ace Magazine, March, 1964, issue: Pictures at pages 17, 18, 19, 24, 25, 26, 32, 33, 34, 35, 40, 41, 42, 43, 49, 50, 51, 57, 58, 59, 66, 67; Articles at pages 11, 21, 22, 48, 69, 70, 28, 29, 30, 80.

Sir Magazine, March, 1964, issue: Picture on cover and at pages 5, 17, 18, 19, 20, 21, 32, 33, 34, 35, 36, 37, 51, 52; Article at page 10-13; Jokes at page 68; Story at page 50.

That the above pictures, articles and cartoons are all of a lewd, lascivious and obscene nature and calculated to appeal to the purient (sic) interest of readers of these magazines; that this specific information should be considered along with the original pleadings filed herein and information mentioned and set out therein.

Wherefore, petitioner prays that the Court permit this Amendment to Complaint and that the specific information [fol. 26] alleged herein to be obscene be considered along with all of the information and allegations mentioned and set out in the original complaint and upon final hearing, all of the material be declared obscene and that the relief

as prayed in the original complaint be granted and for all other general and proper relief.

E. W. Brockman, Jr.

Duly sworn to by E. W. Brockman, Jr., jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 27]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

AMENDMENT TO RESPONSE—Filed April 6, 1964

Come the respondents, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., and for amendment to their Response, state:

They specifically deny that any of the pictures, articles or cartoons mentioned in the Amendment to Complaint are of a prurient or obscene nature or that any are of a lewd, lascivious or obscene nature or that any of them appeal to the prurient interest of readers of the magazines according to community standards.

Wherefore, these respondents readopt the allegations of their original Response and pray that the Complaint as amended be dismissed, and for all other proper relief.

Edwin E. Dunaway, Robert C. Downie, by Edwin E. Dunaway.

[File endorsement omitted]

Duly sworn to by Edwin E. Dunaway, jurat omitted in printing.

[fol. 28] Certificate of Service (omitted in printing).

[fol. 35]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS
FIRST DIVISION

No. 35013

[Title omitted]

RESPONSE OF GENT MAGAZINE AND PAR PUBLICATIONS, INC.—
Filed April 24, 1964

Comes now the Defendant, Gent Magazine, a publication of Par Publications, Inc., by its attorneys, Gregory & Claycomb of Pine Bluff, Arkansas, and for its Response to the Complaint and Amendment to the Complaint of the Plaintiff states and alleges as follows:

The Defendant, Gent Magazine—Par Publications, Inc.—admits that it is a magazine being distributed and sold in Pine Bluff, Jefferson County, Arkansas.

All other allegations of the Complaint and Amendment to the Complaint of the Plaintiff are denied.

The said Defendant specifically denies the allegations of the Plaintiff that there is probable cause to believe that the contents of the Defendant magazine are of an obscene nature or that there is reasonable grounds and probable cause to believe that the stories and articles therein appeal to a prurient interest.

[fol. 36] The said Defendant further specifically denies that the contents of the magazine are of an obscene nature or such as to appeal to a prurient interest or that they are of "lewd, lascivious and obscene nature and calculated to appeal to a prurient interest."

In the alternative, if the said Defendant's magazine should be, under the meaning of the Arkansas statute, found to be an obscene publication, then it is further stated and alleged that:

The said Act 261 enacted by the General Assembly of the State of Arkansas in 1961 in establishing a test for ob-

[File endorsement omitted]

scenity as "contemporary community standards" is in violation of and contrary to the First and Fourteenth Amendments to the Constitution of the United States which requires that the standard for obscenity be a nation-wide standard. The said statute further authorizes the banning of publications on the basis of containing matter other than "hard-core pornography" as that phrase has been used in the interpretation of the First and Fourteenth Amendments to the Constitution of the United States by the Supreme Court of the United States. The said Defendant further denies that under the applicable test for obscenity as enunciated by the United States Supreme Court said Defendant's magazine is obscene.

Wherefore, the Defendant, Gent Magazine—Par Publications, Inc., prays that this Court find that the allegations against the said Defendant are without foundation and there are not reasonable grounds and probable cause for the relief sought by the Plaintiff and that the Defendant's [fol. 37] magazine is not obscene as alleged within the meaning of the State statute, and that said Complaint and Amendment to Complaint as against the said Defendant be dismissed and that said Defendant recover its costs and all other proper relief; or, in the alternative, if said Defendant's publication should be considered to be obscene within the definition of that Act, then the Court find that said statute is unconstitutional insofar as it establishes a standard contrary to the First and Fourteenth Amendments to the United States Constitution, and further find that the said Defendant's publication is not obscene within the constitutional definition of obscenity and that the said Complaint and Amendment to Complaint as against the Defendant be dismissed and that said Defendant recover its costs and all other proper relief.

Gregory & Claycomb, Attorneys for Gent Magazine —Par Publications, Inc., by H. Murray Claycomb.

Duly sworn to by H. Murray Claycomb, jurat omitted in printing.

[fol. 38] Certificate of Service (omitted in printing).

[fol. 216]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

CHARGE TO THE JURY

Gentlemen of the Jury:

The Court seeks your assistance in arriving at the decision of the issues in this case, not for the purpose of escaping the responsibility which the law imposes upon a Chancellor to render decrees but because the Court believes that the combined judgment of twelve substantial citizens who have been selected to serve on this jury would be of material assistance in reaching the right determination.

Now the statute under which we are proceeding, reading the parts that are applicable here is as follows:

"Act 261 of the 1961 Legislature. The purpose and intent of the Act. The General Assembly hereby determines that during the past several years the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of the State against those publications are in the best interest of morals and general welfare of the people. Accomplishment of this end can best be achieved by providing Prosecuting Attorneys, both with the speedy civil remedy for obtaining a judicial determination of character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene pub-
[fol. 217] lications within the state.

Section III. Definitions. The following words, terms and phrases used in this Act shall for the purpose of this Act have the meanings respectively ascribed to them in this section. I. Mailable matter means (a) printed or written matter or material having a second class mailing privilege under the laws of the United States, or (b) any other printed or written matter or material which has not

been determined to be non-mailable under the laws of the United States.

II. Obscene means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Prurient, as used in this statute means to be inclined or disposed to lewdness or lascivious thoughts, to be lecherous.

"III. A person means any individual, partnership, firm, association, corporation or other legal entities"—Let me interpose here, gentlemen, the definition that I just gave you of prurient is not contained in the Statute, that is, the Court supplied the definition of prurient. I am reading now from the Statute.

"IV. Printed or written matter or material means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story, paper or other printed or [fol. 218] written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution."

Section IV provides criminal penalties under certain conditions, which are not involved in this action. The Chancery Court has no criminal jurisdiction and this is not a criminal proceeding.

"Section V. Mailable matter. Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person with knowledge of its contents is engaged in sending, causing to be sent, bringing or causing to be brought into the State for sale or commercial distribution, or in this State preparing, selling, exhibiting, commercially distributing or giving away or offering to give away or has in his possession with intent to sell or commercially distribute or exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting

Attorney for the county in which such mailable matter is sent or caused to be sent, shall institute an action in the Chancery Court in that county for an adjudication of the obscenity of the mailable matter.

Section VI. Action to declare mailable matter obscene. The action authorized by Section V shall be commenced [fol. 219] by the filing of a complaint to which shall be attached a true copy of the allegedly obscene mailable matter. The complaint shall, (a) be directed against the mailable matter by name and description; (b) allege its obscene nature; (c) designate as respondents and list the names and addresses if known of its author, publisher or any person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution. And if any person in this state preparing, selling, exhibiting, commercially distributing or giving away or offering to give away or possessing with the intent to sell, or commercially distribute, or exhibit, or give away or offer to give away; and pray for an adjudication that it is obscene, and pray for a permanent injunction against any person sending or causing it to be sent into this State, pray for its surrender or seizure or destruction."

Now there are other sections in the statute. Do either of counsel think that the other sections ought to be read?

Mr. Dunaway: I don't see any necessity in it.

The Court: I don't believe it will be of any further help.

Now, the court will submit to you certain interrogatories which you will consider. They are numbered one, two and three. Interrogatory No. 1, "Are all the magazines involved in this action obscene?" Obscene as defined by the [fol. 220] statute just read. Your answer to that question will be "Yes" or "NO." If your answer is unanimously "Yes", then you need to consider no further interrogatories. If, however, you find that not all of the magizines are obscene, your answer will be "No" and you will then proceed to consider Interrogatory No. 2, which reads: "If your answer to Interrogatory No. 1 is "Yes" then you will consider no more than Interrogatory No. 1. If your answer

to Interrogatory No. 1 is "No" you will then consider and answer this Interrogatory, to-wit: Are some of the magazines obscene? Answer "Yes" or "No". If your answer to Interrogatory No. 2 be "No" then you will consider no further Interrogatories. If your answer to Interrogatory No. 2 be "Yes" you will designate which of the magazines you find to be obscene" by writing their names, individually.

The Court has been requested to give you certain specific instructions.

Whereupon, the Court gave the following instructions:

COURT'S INSTRUCTION "A"

"The State has not asked for a temporary restraining order or injunction. None of these defendants are charged with violation of any restraining order or injunction."

The Court's Instruction "A" was given without objection.

[fol. 221] PUBLISHER'S REQUESTED INSTRUCTION No. 1

"The statute under which this action was brought defines obscenity in the following language: "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Publisher's Requested Instruction No. 1 was given without objections or exceptions.

PUBLISHER'S REQUESTED INSTRUCTION No. 2

"In determining the dominant theme of the material in evidence in this case, you must decide whether, to the average person, applying contemporary community standards, those materials appeal to the prurient interest of the average person."

Whereupon, the Court, overruled and refused to give Publisher's Instruction No, 2, as offered, and on the

Court's own motion amended said instruction and gave it in its amended form, over the general objections and exceptions of the Publishers as follows:

PUBLISHER'S REQUESTED INSTRUCTION No. 2—AMENDED

"In determining the dominant theme of the material in evidence in this case, you must decide, applying contemporary community standards, whether those materials are obscene."

Mr. Dunaway: We object to the modification by the [fol. 222] Court. The law is that it must be the "Average person".

PUBLISHER'S REQUESTED INSTRUCTION No. 3

"The contemporary "community" in terms of whose standards of decency the issue of obscenity must be decided is not Pine Bluff, Arkansas, or Jefferson County, Arkansas, but that "community" is the national community as a whole."

Whereupon, the Plaintiff objected to Publisher's Requested Instructed No. 3, as offered; Plaintiff's specific objection being as follows:

Mr. Brockman: We have some cases Your Honor to show that that is not correct.

Mr. Dunaway: In order to expedite this matter, may I say this. There are some cases holding both ways, the matter of whether the test is a local community or the national community is presently before the U. S. Supreme Court and may I suggest since the Court has already indicated simplifying, go ahead and refuse this and let us note our objections.

The Court: The Court is refusing the instruction as offered for the reason that this procedure is under statutes enacted by the State of Arkansas and the standard could not be extended beyond that.

Mr. Dunaway: Note our objections to the refusal of the Court to give our Instruction No. 3.

[fol. 223] PUBLISHER'S REQUESTED INSTRUCTION No. 4

"The test of obscenity is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or the depraved, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved.

The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact on the average person in the community. The magazines must be judged as a whole in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."

Whereupon, the Plaintiff objected to Publisher's Requested Instruction No. 4, as offered; Plaintiff's specific objection being as follows:

Mr. Bridgeforth: There is one part of that that wasn't taken from it—he read, "The magazines must be judged." The case reads, "The books must be judged." We contend there is a distinct difference in books and magizines. Magazines have stories—and we have authority for that fact—can be obscene in itself—that entire story, not a particular [fol. 224] part of that story but the entire story—if a particular story in a magazine is obscene and if as a whole then the magazine can be found obscene.

Mr. Dunaway: I think that is true. In the instruction which was quoted in the Roth case from which I took this, it does not use the word "magazine". I have used the word magazine here in order not to confuse the jury because magazines are what we are talking about. In the Roth case it says, "Books, pamphlets paper, letter writing, and other publications."

Mr. Bridgeforth: It says books, pictures and circulars to clear the record.

The Court: Mr. Brockman, what is your overall attitude on this Instruction No. 4, that we have been discussing?

Mr. Brockman: Well, Your Honor, we object to it on the ground that magazines are judged in a different light and therefore you would have to rephrase it or draw the instruction in order to apply to magazines.

The Court: I think the way he has drawn it is incorrect; it shouldn't be given.

Mr. Dunaway: And briefly we think it is correct and should be given.

Mr. Bridgeforth: We have a case in Ohio where the judge ruled a book must be viewed as a whole does not [fol. 225] apply to magazines where stories and pictures are not related to one area or the other.

The Court: It seems to me like counsellor that your instruction as drawn would leave the wrong impression in the minds of the jury. You start out and you say, "The test of obscenity is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or the depraved, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved." Why have that paragraph in there at all? You state that, "The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach."

Mr. Dunaway: The reason that we request that goes back to the difficulties which Your Honor mentioned a few minutes ago that for a jury to understand what is meant by the average man—and we feel that the instruction rather than confusing the jury will help point out to the jury that they have got to think about everybody, including those that are set forth in the first paragraph.

The Court: Well, in the second paragraph, whether the test is the effect upon all those whom it is likely to reach. [fol. 226] Now, this is a good statement. "In other words, you determine its impact on the average person in the

community." The magazines should be judged as a whole in its entire context—that should be modified to read "each article" must be judged as a whole in its entire context, not the magazine. Isn't that correct?

Mr. Bridgeforth: Does it cover the entire article though, not a particular segment of an article?

The Court: Yes. Now as modified here is the way this will read: "The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact on the average person in the community. Each article in the magazine should be judged as a whole in its entire context, and you are not to consider detached or separate portions of an article in reaching your conclusion."

Whereupon, the Court, overruled and refused to give Publisher's Instruction No. 4, as offered, and on the Court's own motion amended said instruction and gave it in its amended form, over the general objections and exceptions of the Publishers as follows:

PUBLISHER'S REQUESTED INSTRUCTION No. 4—(AMENDED)

"The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those [fol. 227] whom it is likely to reach. In other words, you determine its impact on the average person in the community. Each article in the magazines should be judged as a whole in its entire context, and you are not to consider detached or separate portions of an article in reaching your conclusion."

Mr. Dunaway: Note our objection to the refusal of the Court to give our Requested Instruction No. 4 and to the refusal of the Court to give our Instruction as submitted.

PUBLISHER'S REQUESTED INSTRUCTION No. 5

"The mere fact that adulterous or other sexually immoral relationships are portrayed approvingly cannot serve as a reason for declaring a work obscene."

Whereupon, the Court refused to give the above Publishers' Instruction No. 5, over the objections and exceptions of the Publishers.

PUBLISHER'S REQUESTED INSTRUCTION No. 6

"The material at issue must have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires."

Whereupon, the Court gave Publishers' Instruction No. 6, without objection.

PUBLISHERS' REQUESTED INSTRUCTION No. 7

"Nudity is not necessarily obscenity."

Whereupon, the Court refused to give Publishers' Re-[fol. 228] quested Instruction No 7 over the general objections and exceptions of the Publishers.

PUBLISHERS' REQUESTED INSTRUCTION No. 8

"The subject of sex is a great and mysterious force in human life. It is one of the vital problems of human interest and public concern. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly truthfully all matters of public concern."

Whereupon, the Court refused the Publishers' Requested Instruction No. 8 over the general objections and exceptions of the Publishers.

PUBLISHERS' REQUESTED INSTRUCTION No. 9

"The burden is on the State to prove that each of the magazines in this case is obscene."

Whereupon, the Plaintiff objected to Publishers' Requested Instruction No. 9, as offered; Plaintiff's specific objection being as follows:

Mr. Brockman: Is that a burden proved beyond a reasonable doubt?

The Court: No, sir.

Mr. Brockman: I thought we had an instruction as to the preponderance of the evidence.

The Court: You are asking that the instruction be modified by a preponderance of the evidence? The modification will be granted.

[fol. 229] PUBLISHERS' REQUESTED INSTRUCTION No. 9—(AMENDED)

"The burden is on the State to prove that each of the magazines in this case is obscene, by a preponderance of the evidence."

Mr. Dunaway: Note our objection to the modification of our Requested Instruction No. 9 and the refusal of the Court to give it as submitted.

PUBLISHERS' REQUESTED INSTRUCTION No. 10

"There are eight magazines in evidence which the State alleges to be obscene. You must determine the obscenity or not of each magazine independently of the others and after reading of each magazine in its entirety, so that you may determine its dominant theme as a whole."

Whereupon, the Court refused Publishers' Requested Instruction No. 10 over the general objections and exceptions of the Publishers.

[fol. 230] After the Instructions had been given, the Court on its own motion further instructed the jury as follows:

The Court: The claim of constitutional freedom has been raised by several of these defendants. You are informed there is no Constitutional protection for filth, obscenity or prurience, for these serve no useful purpose to our society nor to any individual. The Court does not intimate either directly or indirectly that the magazines in question here or any one or more of them are filthy, obscene or prurient. That is the question for your gentlemen

to decide. It is claimed that the defendants are entitled to freedom. Under our system every citizen is entitled to freedom so long as he does not infringe upon the freedom of others. For example, our Constitution gives a citizen a right to bear arms, but he may not bear them so as to hurt others; he may not ship them within the city limits of many cities because to do so might endanger the safety of others. A free press is likewise guaranteed by our Constitution but that does not mean that a newspaper can print anything that it wishes about anybody. The newspaper may not use its columns for libel without being subject to such damages as a jury might assess. It is just as important to protect the character as it is to protect the reputation, as from libel, or to protect the body from firearms. In a free society such as ours the citizen must recognize his responsibility to use his freedom so as not to injure the freedom of others. History shows that freedom when-
[fol. 231] ever freedom is abused, freedom disappears. Gentlemen of the jury, do not reach your decision on a basis of who is the more skillful for this is not a contest of skill. This is a matter of vital concern to this entire community. If you find these magazines to be unfit for publication because they are obscene, then the Court will take such action as it deems appropriate. If you find they are not, then your findings will weigh heavily upon the Court. If all of you gentlemen agree in your answers to the interrogatories, whatever your answer may be, let the interrogatory be signed by one of your number as foreman. If nine of you only agree then let each one of the nine sign the interrogatories and you will return them in open Court when you have considered them. You will have the magazines submitted to you and will retire for the deliberation.

The above and foregoing were all of the instructions asked on behalf of either party hereto, and given, modified, refused, or given upon the Court's own motion at the trial of the cause mentioned in the caption.

[fol. 255]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

GENT, et al., Appellants,

v.

THE STATE OF ARKANSAS, Appellee.

APPEAL FROM THE JEFFERSON COUNTY CHANCERY COURT
FIRST DIVISION

Hon. Joseph Morrison, Chancellor

Abstract and Brief for Appellants

STATEMENT OF THE CASE

This appeal involves a review of the proceedings held in the Jefferson County Chancery Court under the provisions of Act 261 of 1961, Ark. Stats. (1947) 41-2713 *et seq.*, wherein certain nationally circulated magazines were found to be obscene and their continued circulation enjoined. All the magazines enjoyed second class mailing privileges under the laws of the United States.

[fol. 256] Act 261, the so-called Arkansas Law On Obscenity, provided a double-barrelled weapon for attack on alleged obscenity. The statute made possession or distribution of obscene printed matter a felony and provided stiff penalties of both fine and imprisonment for its violation. Other sections of the Act provided for a civil remedy in proceedings to be instituted by the Prosecuting Attorney in the Chancery Court to determine the obscenity *vel non* of allegedly offensive printed or written matter.

It was under the civil provisions of the law that the instant case arose. The criminal parts of the Act are not here directly in issue. Upon complaint of the Prosecuting Attorney that appellant magazines are obscene, the Chancellor made an initial ex parte finding that there was probable cause to find the magazines obscene, and issued an order for the magazines, their non-resident publishers, the local wholesale distributor and the Pine Bluff newsstand retailer to show cause why said magazines should not be adjudicated obscene.

Act 261 defined "obscene" as meaning "that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Ark. Stats. (1947) §41-2715(2). [fol. 257] Appellant magazines and publishers denied that the publications are in fact obscene according to constitutional standards, and attacked the constitutionality of Act 261 as violative of the First and Fourteenth Amendments to the Constitution of the United States in abridging freedoms of speech and the press and in depriving appellants of their property without due process of law. Appellants further alleged violations of the Constitution of the State of Arkansas, Article II, Sections 6 and 8.

An advisory jury was impanelled on motion of the State. At the conclusion of an extended trial, and after deliberating twenty-five minutes, the jury found all the magazines in suit to be obscene. An immediate injunction issued restraining continued possession or circulation of any of the magazines. The court also retained jurisdiction to find future issues of appellant magazines to be obscene.

This appeal is by the magazines Swank, Modern Man; Bachelor, Cavalcade, Gentleman, Ace and Sir and by the publishers of each.

[fol. 258] POINTS TO BE RELIED UPON

I

The magazines are not obscene according to constitutionally permissible standards.

II

The injunction as issued was not authorized by Act 261 and amounts in effect to an unconstitutional prior restraint on future publication.

III

Although only advisory, the jury should have been composed of legally qualified jurors who were properly instructed as to the law:

(A) The court erred in not excusing certain jurors because of their answers on voir dire when challenged for cause.

(B) The trial court erred in not properly instructing the jury as to the standards to be used in determining whether the magazines were obscene.

IV

The evidence of other magazines currently being circulated and newspaper stories and advertising offered by appellants for the purpose of aiding in determining contemporary community standards should have been admitted.

[fol. 259]

V

The court erred in refusing to permit appellants' counsel on cross examination to ask the State's witnesses whether they considered certain books and other publications obscene.

VI

Act 261 as applied violates the First and Fourteenth Amendment to the Constitution of the United States in abridging freedoms of speech and press and in depriving appellants of their property without due process of law.

VII

Act 261 as applied violates Article II, Section 6, of the Constitution of Arkansas in that it deprives appellants of liberty of the press and a free communication of thoughts and opinions; and is violative of Article II, Section 8, of the Arkansas Constitution in that it deprives appellants of their property without due process of law.

* * * * * * *

[fol. 270]

ANSWER OF W. E. BURNHAM, JR., AND JOHN NICKELL TO AMENDMENT TO COMPLAINT—Filed April 13, 1964

The defendants for answer to the amendment to the complaint adopt and renew the statements and allegations of their original answer and pray that the Court enter an order directing what action they shall follow and for all equitable relief (Filed April 13,1964).

MOTION—Filed April 13, 1964

The State of Arkansas moves the court to impanel a jury and for cause states: That due to the unique character of this case, a jury would provide invaluable assistance in the [fol. 271] determination of the issues involved herein, and pray the Court to exercise its discretion and order a jury to be impaneled to assist in the determination of the issues (Filed April 13, 1964).

At page 32 appears a motion for leave to file response for Gent Magazine and Par Publications, Inc. At page 35 appears a response of Gent Magazine and Par Publications, Inc. These pleadings do not concern these appellants and we presume will be abstracted by counsel for Gent and Par Publications, Inc.

(The following was the one of several interrogatories submitted by the Court, which the jury answered.)

Interrogatory No. 1

Q. Are all the magazines involved in this action obscene?

A. Yes.

Signed T. J. Thornton, Foreman

Decree

On this day this cause comes on to be heard, the State of Arkansas appearing by E. W. Brockman, Jr., Prosecuting Attorney, and by Harley Cox and William C. [fol. 272] Bridgeforth; the defendants W. E. Burnham, Jr., and John Nickell appearing in person and by their attorney, Jay W. Dickey; the defendant magazines Swank, published by Royal Publications, Inc; Modern Man, published by Copyright Developers Corp.; Bachelor, published by Magtab Publishing Corp.; Cavalcade, published by Skye Publishing Co., Inc.; Gentleman published by Bruce Royal Publishing Co.; Ace, published by Four Star Publications, Inc.; Sir, published by Volitant Publishing Corp., represented by Edwin E. Dunaway and Robert C. Downie; a motion filed by Gent magazine published by Par Particulars (sic) by its attorney H. Murray Claycomb, praying that it be permitted to file response, said motion was denied and that although denied proof was heard as to claims against Gent magazine.

The Chancellor directed a drawn jury to be selected in the same manner as one is selected by laws to try civil matters, a jury should be chosen from the regular venire which had been selected by Jury Commissioners for the current term.

This cause was heard by the Chancellor and the jury upon the testimony of witnesses, exhibits thereto and other matters and things before the Court.

[fol. 273] The Court finds: the jury by unanimous verdict found the following publications are obscene: Gent magazine, February, 1964, issue; Swank magazine, March, 1964, issue; Modern Man, February, 1964, issue; Bachelor magazine, March, 1964, issue; Cavalcade magazine,

February, 1964, issue; Gentleman magazine, April, 1964, issue; Ace magazine, March, 1964, issue; Sir magazine, March, 1964, issue.

The Court also found the above magazines to be obscene; that defendants should be enjoined from sending or causing to be sent, bringing or causing to be brought into Jefferson County, or for sale or commercial distribution in Jefferson County or preparing, selling, exhibiting or commercially distributing, giving away or offering to give away or possessing any of the above magazines with the intention to sell or commercially distribute or give away or offering to give any of said magazines away subject to further orders of this Court.

That all of the above described magazines should be destroyed and that the defendants are given ten days in which to destroy said magazines.

The Court finds that said magazines are obscene and it specifically retains jurisdiction to determine whether any future issues are obscene and whether or not they come within the terms of this order; that defendants are hereby [fol. 274] notified that any future distribution of obscene publications as set out and found above to be obscene will also be restrained and enjoined and magazines will be removed.

It is, therefore, considered, ordered, adjudged and decreed that defendants John Nickell, W. E. Burnham, Jr., Par Particulars, (sic) Inc., Royal Publications, Inc., Copyright Publishers Development Corp. Magtab Publishing Corp., Skye Publishing Co., Inc., Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp. be, and they hereby are restrained and enjoined from selling, exhibiting or commercially distributing any of the following magazines: (Here the Court designates the same issues of the same magazines set forth in the Complaint.) or giving away or offering to give away said magazines or possessing any of said magazines with the intent to sell or commercially sell or give away or offer to give away any of said magazines in Jefferson County, Arkansas.

It is further by the Court considered, ordered, adjudged and decreed that the defendants be, and they are hereby ordered and directed to refrain from sending or causing to be sent, bringing or causing to be brought into this County for sale or commercial distribution or in Jefferson County, Arkansas, preparing, selling, exhibiting or com- [fol. 275] mercially distributing any of the above described magazines, giving away or offering to give away or possessing said magazines with the intent to sell or commercially sell or distribute or give away or offer to give away any of said magazines in Jefferson County, Arkansas, and the defendants be, and they are hereby ordered and directed to destroy said magazines.

It is further considered, ordered and decreed that the defendants are hereby notified that any future distribution or sale of the above magazines which are of like obscene character comparable to the above issues of said magazines, will be enjoined upon a showing that said magazines are obscene, and the Court retains jurisdiction of this cause of action to carry out the terms and conditions of this order and to make such orders as may be necessary concerning the sale of the following described magazines in the future: Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace or Sir magazines.

To which decree the defendants object.

/s/ Joseph Morrison
Chancellor

(Dated May 13, 1964, and entered *nunc pro tunc* as of April 29, 1964) (T.44-47.)

[fol. 276]

Notice of Appeal

Notice is hereby given that the defendants Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp.,

Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., appeal to the Supreme Court of Arkansas from the judgment and decree of the Court dated May 13, 1964, and entered *nunc pro tunc* as of April 29, 1964 (T.50) (Filed May 20, 1964).

Designation of Record

Defendants, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., designate the entire record as the record on the appeal (Filed May 20, 1964) (T.51).

Motion

Motion by appellants to grant extension of time for filing the record and docketing the appeal to November 27, 1964 (Filed August 14, 1964 (T.56).

[fol. 277]

Order

The time for filing the record and docketing the appeal in this cause in the Supreme Court of Arkansas is extended to November 27, 1964. (Dated August 14, 1964) (T.57).

Reporter's Transcript

Be it remembered, that on the 28th and 29th days of April, 1964, before the Honorable Joseph Morrison and a jury, the above entitled cause came on for trial, and in the course thereof evidence was introduced, objections made, exceptions taken, and other proceedings had, which are as follows, to-wit:

Appearances

Mr. E. W. Brockman, Jr., Prosecuting Attorney Coleman, Gantt, Ramsay & Cox, by E. Harley Cox, Jr., and William Bridgeforth, for Plaintiff.

Dunaway & Downie, by Edwin Dunaway and Robert Downie, for defendants Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, (and for the publishers of each).

Gregory & Claycomb, by Mr. Murray Claycomb, for Gent Magazine (and its publisher).

[fol. 278] Mr. Jay W. Dickey, for the defendants John Nickell and W. E. Burnham, Jr.

* * * * * * *

[fol. 279] Direct examination.

Mr. W. E. Burnham, one of the defendants, testified:

* * * * * * *

[fol. 280] Q. Now are these magazines that are involved in this lawsuit also distributed by the wholesalers all over the State of Arkansas.

A. Yes, sir.

Mr. Brockman: I object to that.

The Court: I don't see where that would be important.

Mr. Dunaway: It is important Your Honor in that under our contention that under the latest case the community standard by which obscenity is tested is the national standard. The reason we are asking the question is to show that these magazines are generally sold and accepted in the State of Arkansas and my next question was going to be whether this was also true nationally.

The Court: What does the State say about it?

[fol. 281] Mr. Brockman: Your Honor, I am sorry I didn't quite get all of his offer. I don't think the standard is nationwide; I think it is purely what the law is, would be what applies in Jefferson County.

Mr. Dunaway: Your Honor, I am not arguing that point now but we will argue it but I am explaining my asking this question.

The Court: It would be pertinent now because if the matter was not nationwide, if the standard was not to be judged on a nationwide basis then the evidence would be incompetent, outside of his own territory and outside of his own Pine Bluff community. Are you offering the fact that the magazines are sold as evidence of a nationwide standard of morality?

Mr. Dunaway: Nationwide standard of what is not obscene and further—

[fol. 282] The Court: (Interrupting) The question of whether it is obscene is the question in the lawsuit. Now that is for the court to decide with the aid of the jury. Now the mere fact of sale doesn't make it either more or less obscene or prurient. It doesn't affect it one way or the other. The obscenity is in the nature of the matter of itself. I don't believe it would be competent to go into this outside of his own district.

Mr. Dunaway: Note our objections to the refusal of the court to let us ask as to the circulation in other places in the State of Arkansas and also on a national basis.

* * * * * * *

[fol. 302] The Court: . . . Gentlemen, there will be a permanent restraining order restraining the sale of these magazines in this district.

Mr. Dunaway: Did I understand the court correctly to say that the sale of all these magazines is permanently restrained and the injunction will not be confined to the issues of the magazines which are in the suit?

[fol. 303] The Court: That's right (T.232).

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients (T.233).

By Leave of the Court, the Defendant Publishers, introduced the following Exhibits.

Mr. Dunaway: At this time I want to make the tender of proof which was overruled, certain newspaper articles, editorials and advertisements tending to show the community standards. The items are those which would have been introduced had the court permitted their introduction. Exhibit No. 1, an article appearing in the Arkansas Gazette, April 26, 1964, headlined "Orgy at the Beach—or Spring Revels of College Set."

(Copy of Publishers' Exhibit No. 1 may be found at page 239 of this transcript.)

[fol. 304] Mr. Dunaway: Exhibit No. 2, Picture and Article concerning State Public Library Trustees discussion of censorship, Arkansas Gazette, Friday, April 24, 1964.

(Copy of Publisher's Exhibit No. 2 may be found at page 240 of this transcript.)

Mr. Dunaway: Movie advertisement for movie, "The Playgirls and the Vampire," Pine Bluff Commercial, March 3, 1964.

(Copy of this Publisher's Exhibit No. 3 may be found at page 241 of this transcript.)

Mr. Dunaway: Exhibit No. 4, Movie ads showing picture of Jane Mansfield for movie "Promises! Promises!" and an ad for movie "Move Over Darling," Pine Bluff Commercial, March 6, 1964.

(Copy of this Publisher's Exhibit No. 4 may be found at page 241 of this transcript.)

[fol. 305] Mr. Dunaway: Exhibit No. 5, Movie ad for movies "Dr. No." and "Mail Order Bride," Pine Bluff Commercial, March 13, 1964.

(Copy of Publishers' Exhibit No. 5 may be found at page 242 of this transcript.)

Mr. Dunaway: Exhibit No. 6, Movie ads for "Fun in Acapulco" and "Blood Feast," Pine Bluff Commercial, March 21, 1964.

(Copy of Publishers' Exhibit No. 6 may be found at page 243 of this transcript.)

Mr. Dunaway: Exhibit No. 7, movie ad for "All the Way Home" Pine Bluff Commercial, February 21, 1964.

(Copy of Publishers' Exhibit No. 7 may be found at page 244 of this transcript.)

[fol. 306] Mr. Dunaway: Exhibit No. 8, Movie ad "Under the Yum Yum Tree," Pine Bluff Commercial, January 15, 1964.

(Copy of Publishers' Exhibit No. 8 may be found at page 245 of this transcript.)

Mr. Dunaway: Exhibit No. 9, movie ads listing number of movies to appear at the Saenger Theatre and an ad for movie, "The Playgirls and the Bell Boy," Pine Bluff Commercial, January 1, 1964.

(Copy of Publishers' Exhibit No. 9 may be found at page 246 of this transcript.)

Mr. Dunaway: Exhibit No. 10, Editorial, "The Censors Go to Court," Pine Bluff Commercial, January 12, 1964.

(Copy of Publishers' Exhibit No. 10 may be found at page 247 of this transcript.)

[fol. 307] Mr. Dunaway: Exhibit No. 11, Editorial "Morality and Censorship" and column headed "Behind the News,—When is a Censor Not a Censor?" Pine Bluff Commercial, November 3, 1963.

(Copy of Publishers' Exhibit No. 11 may be found at page 248 of this transcript.)

Mr. Dunaway: Exhibit No. 12, Editorial "A Censorship Committee," Pine Bluff Commercial, October 20, 1964.

(Copy of Publishers' Exhibit No. 12 may be found at page 249 of this transcript.)

Mr. Dunaway: Exhibit No. 13, ad "Wives and Lovers" Pine Bluff Commercial, October 20, 1963.

(Copy of Publishers' Exhibit No. 13 may be found at page 249 of this transcript.)

[fol. 308] Mr. Dunaway: Exhibit No. 14, movie ad "Who's Been Sleeping in My Bed" Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 14 may be found at page 250 of this transcript.)

Mr. Dunaway: Exhibit No. 15, ad for "The Bellboy and the Playgirls," Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 15 may be found at page 250 of this transcript.)

Mr. Dunaway: Exhibit No. 16, Editorial, Guidelines," Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 16 may be found at page 251 of this transcript.)

Mr. Dunaway: That—is all the newspapers. Then further tender of proof in connection with the testimony of Mr. William Burnham, we would like for the record to [fol. 309] show that had Mr. Burnham been permitted to answer the question he would have testified that he is the distributor for "Playboy" magazine and that this magazine is distributed in Pine Bluff and would have identified a copy of "Playboy" magazine for April, 1964, and it would have been introduced as Exhibit 1 to his testimony.

(Copy of Publishers' Exhibit No. 17 is submitted under separate cover with the other magazines introduced in evidence.)

(T.234-237).

The reporter's certificate appears at transcript 252; the Clerk's Certificate appears at transcript 253, and the Statement of Costs at 254.

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[fol. 312]

II

The injunction as issued was not authorized by Act 261 and amounts in effect to an unconstitutional prior restraint on future publication.

Immediately after the jury had returned its verdict the court announced that there would be a permanent restraining order restraining the sale of these magazines and that the injunction would not be confined to the issues of the magazines involved in the lawsuit (Abs.152).

In the decree as entered, the court's position was modified. Only the circulation of the specific issues in suit was enjoined. However, the court went on to make this additional finding: "... that said magazines are obscene and it specifically retains jurisdiction to determine whether any future issues of said magazines are obscene and whether or not they come within the terms of this order ..." (Abs.19-20).

This decree goes beyond what is authorized by the statute. Act 261 seems plain in its terms. The printed matter sought to be banned must be specifically set out and the injunction must specifically name that which is restrained from being circulated. Ark. Stats. 41-2718, 41-2723.

[fol. 313]

VI

Act 261 as applied violates the First and Fourteenth Amendment to the Constitution of the United States in abridging freedoms of speech and press and in depriving appellants of their property without due process of law.

The finding of the Chancellor that appellant magazines were obscene, in the face of applicable constitutional tests of obscenity, and the issuance of the injunction shown by the record, violated appellants' rights of free speech and free press under the First and Fourteenth Amendments

to the Constitution of the United States and deprived them of their property without due process of law.

VII

Act 261 as applied violates Article II, Section 6, of the Constitution of Arkansas in that it deprives appellants of liberty of the press and a free communication of thoughts and opinions; and is violative of Article II, Section 8, of the Arkansas Constitution in that it deprives appellants of their property without due process of law.

For the reasons heretofore stated, the injunction issued was in violations of appellants' rights under the Constitution of Arkansas.

[fol. 314]

IN THE SUPREME COURT OF ARKANSAS

No. 5-3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMEN, ACE AND SIR MAGAZINES, Appellants,

v.

STATE OF ARKANSAS, Appellee.

Appeal from the First Division Chancery Court of Jefferson County, Arkansas.

* * * * * * *

Honorable Joseph Morrison, Chancellor.

SUPPLEMENTAL ABSTRACT AND BRIEF FOR APPELLANT GENT MAGAZINE - PAR PUBLICATIONS, INC.

Statement of the Case

To eliminate undue repetition of the facts, Appellant Gent Magazine - Par Publications, Inc., adopts the state-

[fol. 315] ment of facts made by the other seven Appellants and supplements it with the following additional statement.

After the Complaint was filed commencing the action, the Court issued an order to each of the Appellants directing that they show cause why they should not be declared obscene on or before March 12, 1964. On March 11 or 12 a joint Answer was filed for all eight appellants, the Court being advised at time by the attorneys filing the Answer, that they had been asked to file an Answer on behalf of Gent Magazine by their clients although they had not been directly contacted by Gent Magazine yet. The same day a telegram to the Chancellor was delivered from the general counsel for Gent Magazine indicating that they had not yet obtained local counsel and requesting a reasonable extension of time to retain counsel to oppose the Complaint.

The Chancellor replied to the Gent Magazine's general counsel that the telegram had been received and the cause continued to be heard April 28.

By letter of the same date, the Court directed Mr. Downie to withdraw the Answer previously filed on behalf of Gent and advising of the telegram. The Answer was [fol. 316] then withdrawn. Local counsel for Gent was obtained April 20 and a Motion to File a Response and the Response was tendered to the Court April 24. On April 28, 1964 the case came on for trial and the Court ruled that Gent's Response would not be allowed and that Gent could not be represented in the hearing by counsel or participate in the trial. Thereafter, the cause proceeded to trial as set out in the statement of the other seven Appellants.

After the trial, this Appeal was taken by Par Publications, Inc., the publisher of Gent Magazine.

[fol. 320]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, Appellants,

—v.—

STATE OF ARKANSAS, Appellee.

Appeal from the First Division
Chancery Court of Jefferson County, Arkansas

OPINION DELIVERED—May 24, 1965

Modified and Affirmed.

CARLETON HARRIS, Chief Justice.

This appeal is from a Decree of the Jefferson Chancery Court, holding that certain magazines were obscene. The court enjoined the appellants from sending, bringing, or causing to be brought, into Jefferson County for sale, exhibit, or gift, any of these magazines, and ordered them destroyed. Jurisdiction was retained to determine whether any future issues are obscene, and appellants were "notified that any future distribution of obscene publications, as set out, and found above, to be obscene, will also be restrained and enjoined and magazines will be removed." Included in the injunction were W. E. Burnham, Jr., county distributor of the magazines, and John Nickell, operator of a newsstand, which sold the magazines. The particular publications held to be obscene were *Swank, Gent, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir.*[1]

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[1] Actually, this court would be justified in dismissing the appeals because of non-compliance with Rule 9. We recognize that the contents of the magazines could not be fully abstracted, but we

[fol. 321] The case arose upon complaint of the Prosecuting Attorney that the magazines were obscene, and in violation of Act 261 of the General Assembly of 1961 (Ark. Stat. Ann. §41-2713-2728 [Repl. 1964]). The Chancellor impaneled, on motion of the state, an advisory jury, which, at the conclusion of an extended trial, unanimously found all magazines listed to be obscene. The court also found the magazines to be obscene, and issued its injunction. From the decree so entered, appellants bring this appeal.

One preliminary matter needs to be disposed of. The court refused to permit *Gent* to file an answer, holding that the answer had not been tendered in time, and the judgment, as to this publication, was taken by default. We think the court erred. General counsel for the publication of *Gent,* in New York, wired the court on March 11, 1964, asking for a continuance, for the purpose of obtaining suitable counsel. The Chancellor replied by letter, acknowledging the telegram, and stating, "The cause was continued yesterday to be heard April 28, at 9:30 AM." Local counsel was subsequently retained, and tendered a response on April 24. We think the Chancellor's reply, which neither denied the request, nor indicated that the court had no authority to grant same, could well have been taken by New York counsel to mean that *Gent* had until April 28 to file an answer. Accordingly, appellant's request that it be made a party to this appeal, and that its argument on the merits of the appeal be considered by this court, is granted.

For reversal, seven alleged errors are asserted; however, some of these errors relate to the selection of, and instruc-

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know of no reason why copies of each magazine offered in evidence could not have been furnished for each judge to examine. The inconvenience occasioned by seven different judges examining the one copy of each magazine is obvious. However, because of the importance of, and interest in, the case, we have separately inspected the exhibits in order to reach a determination on the merits of the litigation.

tions given to, the jury. Error is also asserted because of the court's refusal to admit into evidence other magazines and articles, as a matter of comparison, and the refusal to permit counsel to inquire from the state's witnesses whether [fol. 322] they considered these other publications obscene. However, during oral argument before this court, counsel for all appellants requested that we make a determination on the merits, *i.e.*, that we decide whether the magazines are obscene, rather than remand the case because of error committed during the trial. We therefore, do not consider the alleged errors heretofore mentioned. Suffice it to say that we agree that procedural error was committed, but in compliance with appellants' request, we disregard legal mistakes committed in selecting and instructing the jury, and proceed to a discussion of the principal issue.[2] In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of the law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion.

In 1957, the United States Supreme Court decided the case of *Roth* v. *United States*, 354 U. S. 476. After holding that obscenity is not within the area of constitutionally protected speech or press, the court stated:

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin [1868] LR 3 QB 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to*

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[2] A jury in Chancery Court acts in an advisory capacity only, the court not being bound by jury findings. In this case, both the jury and the Chancellor reached the same conclusion.

prurient interest.[3] The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

[fol. 323] Following this decision, a number of states, through their legislatures, adopted the italicized standard. In 1961, the Arkansas General Assembly passed Act 261, which defines the word, "obscene," in the exact language set forth in the *Roth* case.

Appellants, for reversal, rely upon the more recent case of *Jacobellis* v. *Ohio,* 378 U.S. 184, and assert that this case makes clear that the "contemporary community standards," mentioned in *Roth,* actually refers to a "national" community, rather than a "local" community. Appellants vigorously argue that *Jacobellis* determined conclusively that the "national community standard" must be applied. We cannot accept this contention, since it does not appear that five judges, constituting a majority of the court, agreed upon the "national community" standard. The case was decided by a six to three vote, in which the lower court was reversed. There was no court opinion. Mr. Justice Brennan announced the decision, and wrote an opinion. Mr. Justice Goldberg concurred in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Douglas, Black, and Stewart concurred in the judgment of reversal, the first two on the basis that the Constitution does not permit censorship at all, and Mr. Justice Stewart, in a separate opinion, stating that the constitution only permits censorship of "hard core pornography;" further, "I shall not today attempt further to define the kinds of material I understand to be embraced

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[3] Emphasis supplied.

within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not [fol. 324] that." Mr. Justice White concurred in the judgment for reversal, without expressing a reason. The Chief Justice, joined by Justice Clark, in a dissenting opinion, rejected the national standard, which Justices Brennan and Goldberg stated the court must apply. Mr. Justice Harlan likewise dissented, saying:

"* * * The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws and protection of genuine rights of free expression. * * *"

Thus, it appears that only two justices of the prevailing six adopted the national community standard. It is therefore evident that a majority of the court, whatever may be the thinking, have not flatly said that the national standard must be applied. Much has been written about the *Jacobellis* case, and we think one of the most comprehensive articles (or notes) appears in 40 Notre Dame Law., P. 1 (Dec. 1964).[4] The article states:

"According to the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio,* the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country—all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion."

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[4] The note was prepared by Joseph O'Meara, Dean of the Notre Dame Law School, and Thomas L. Shaffer, Assistant Professor of Law of the Notre Dame Law School.

After pointing out that, though critical, the writers in [fol. 325] tend nothing derogatory toward the court or its individual members, it is further stated:

"Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelops the problem of obscenity as a result of the opinions in some recent Supreme Court cases and the entire absence of opinion in others."

The article then notes that Justice Brennan sets out in his opinion that the Supreme Court must ultimately decide when a particular work is obscene, and the article poses the question of the logic of the court itself deciding obscenity cases when it does not decide for itself matters of equal or greater importance; for instance, whether a convicted murderer, when firing a fatal shot, was capable of distinguishing right from wrong, or was under a compulsion so strong that he was without power to resist it. These matters, of course, are determined by a jury. It is the opinion of the writers of the article that the Supreme Court, in deciding that it is the duty of the court to make its own independent decision of the issues in obscenity cases, has committed itself to an impossible task.

"Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

"As a matter of *fact* there is no national community standard. Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well. • • •

"• • • And to go back to population, the standard varies from one large city to another. Thus, it appears that [fol. 326] practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

"Further examples of the *fact* that standards vary from one community to another come readily to mind. Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? * * *

"Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say, Washington, D.C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

"Even as regards the big cities, there is no 'community standard.' There are many and conflicting standards; and our legal institutions provide judges no mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard. But that is historically the role and function of the jury. The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple."[8]

Summarizing the views expressed in the several *Jacobellis* opinions, it is obvious that the court, in the final analysis, determines obscenity cases *de novo,* but the standard applied is not so readily apparent.

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[8] 13 Kan.L.Rev., P. 117 (1964), also contains an interesting article entitled "Obscenity: The Search for a Standard."

The stories and pictures in the eight magazines in question, in the main, deal with the theme of sex. The pictures generally portray side or back views of young females, totally unclad, or front views of the girls, unclad from the waist up. A large number of the stories, or articles, deal [fol. 327] with adultery or fornication, the number varying in the several magazines.[6] In fact, all can be classified under the general term, "girlie" magazines. A few examples of the type of stories, or articles, found will illustrate the general theme. For instance, the following is an excerpt from a story in *Ace,* entitled, "On the Level:"

"The window was open.

"I tugged at the shade and it snapped up with a swish, and there I was gazing at the two most perfect breasts in creation. Full they were, and round and firm, and by any criterion, utterly fantastic. She was powdering them with a fluffy pink puff, and as the shade flew up she paused in mid-puff. • • •

"She was lovely, but there was something wrong in the way she looked, in the tilt of her head, in the raven shimmer of her lustrous black hair, in the feline greenness of her eyes. And then I knew what it was—she was on her feet.

"Just as Goya's nudes would look ludicrous standing up, and Botticelli's undraped beauties would look foolish except lying down, so this chick was made for the horizontal; and while she was great standing upright, I knew that on her back she'd be sensational. • • •

"We reacted to one another as if we were oppositely magnetized. My mouth was on her lips—moist, full, red

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[6] No effort is made in appellants' briefs to point out differences in the articles, or pictures, from the different magazines, i.e., one magazine might possibly contain obscene material, but another particular magazine does not. It is simply the contention of appellants that none of the magazines can be classified as obscene, under the law as declared by the United States Supreme Court; a separate argument is presented by *Gent,* which is represented by different attorneys.

lips. I've a thing for lower lips. The chick can be a dog, as long as the lower lip is a full, soft one.

"She intertwined herself about me, nudely white from cascading raven hair to scarlet toenails, and the sensation was not of this world. I could feel the sleek perfection of her body through my clothes, her ruby-tipped breasts pushing against me impatiently. I felt her soft arms around me, under my arm-pits, as she hooked her exquisitely manicured hands at my shoulders, thrusting her dancer's belly toward me.

"And I suddenly realized that we were standing by the open window. Not only could we be seen in sharp relief against the white apartment walls by everyone in neighboring apartments, but my colleague, a fellow student, might come looking for me any moment. I pried loose, and the chick let go with low moans that set my hair climbing. I'd been right. She was the type that digs. What might have been foolish prematurity had turned out to be telling perception. She was a chick who thought 'horizontally.' • • • [fol. 328] "• • • What it was with her, I couldn't quite pin down, but she never made love in the dark, and always with the blinds up—and once while there was a girl friend in the living-room. It got to be a bit embarrassing. But she was a cool sketch, and she knew how to use that horizontal body of hers—*so well*. I didn't really give a damn."

In *Bachelor*, a particularly obnoxious (to us) article appears, entitled "Those Free-Loving Coeds—Why Every Man Should Go To College." The opening paragraphs of this article (giving some idea of the nature of the remainder of the story) are as follows:

"If you're a young man with plenty of initiative, zip and get-up-and-go, the place to be right now is in college. Just think of all the advantages. I don't mean the ordinary ones of being exposed to the great minds of science and the arts, learning from brilliant instructors and preparing yourself for a career. The advantages I'm talking about are even

more important and have to do with meeting the most willing group of coeds ever to invade the campus scene.

"The fact is, today's crop of college girls are not only loving more—but they are more lovable, too. And it all goes to give Joe College fonder memories of his Alma Mater to take with him when he graduates.

"Only recently, for example, an anonymous senior from a large coed university in the middle-West was asked by an interview why his school had so few panty-raids, in comparison with some of the all-male Eastern schools.

"The senior grinned. 'Why *should* we have panty raids, here?' he asked. 'They are all right for guys who can't get enough of the real thing. The girls in this school, though, keep us perfectly happy and content.'"

Again, in *Ace,* the story, "39 Inches of Femme Fatale," commences as follows:

"'You are a bitch!' Louise said.

"'Yes, aren't I?' Carla Sanders laughed indulgently. 'And right here is 39 uptilted inches of bitchiness that I intend to make pay off.' Insultingly she cupped her hands under her breasts."

From *Cavalcade,* "The Wrong Chimney:"

[fol. 329] "'Shh,' she murmured.

"She lifted his hand to cup her full breast, and turned a bit, her eyes closed, lifting her face to kiss him on the mouth, her rich lips parted. His hand felt her warm softness and moved of itself, amorously, his other hand automatically reached behind her, caressing, his mouth felt her warm lips and the tip of a tongue going into his, darting, exploring.

"She drew her face back a little, breathing fast, her eyes still closed. He looked at the lovely features he'd dreamed of so often looking just this way, with the same eager, surrendering expression, and reached for her again.

"'You were late,' she said softly. 'I was afraid . . . . Don . . .'

"She stopped talking as her mouth again met his. Then it penetrated . . . Don, she'd said. He started to draw back but he couldn't, he wanted her too much. He raised his hand a little to the back of her proud lovely neck and kept her mouth pressed to him. Then he thought . . . polite . . . proper . . . courteous . . . an officer and a gentleman, and pulled his seeking lips from her eager mouth.

" 'Hurry,' she said, her eyes still closed. 'We only have a few minutes.' "

We recognize that articles, or stories, (and pictures) dealing with sex are not necessarily obscene. The material only becomes obscene when it deals with sex in a manner appealing to prurient interest. Of course, there are frequently pictures or drawings in health and art magazines, which might be said to deal with sex, but such magazines would not be considered obscene, because their *dominant theme* relates to health or art. In Lockhart and McClure, "Censorship of Obscenity," 45 Minn. L. Rev. 5, Page 91, we find:

"In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene . . . "[7]

[fol. 330] There are articles, or stories, in these eight magazines, which would not be considered obscene, but, in viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and

[7] It is mentioned also that some pornographers "may seek to disguise the pornographic nature of the dominant theme of the materials they assemble, by the inclusion of some material that is clearly legitimate."

any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest.

Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco,[8] nor is there any way for us to know the "standard" of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards [fol. 331] in Pine Bluff, Arkansas.[9]

We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it, for we recognize that the rulings of the United States Supreme

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[8] The press carried an account, datelined San Francisco, May 9 of this year, as follows: "Bosoms were bared again Saturday as bawdy North Beach celebrated the acquittal of its topless dancers and fashion models.

"Two separate juries brought in the innocent verdicts Friday, vindicating nightclub owners and their busty showgirls of police charges of lewd conduct."

It is interesting to note that the trial judge, in directing the jury to return a verdict of not guilty, stated: "No police officer can substitute his personal feelings of what is right or wrong.

"The test is not what a couple of people feel. The test is what the people of San Francisco feel."

This occurrence points up the difference in the standards over the nation, for women appearing in this state in similar "attire" (or lack of it) would be in violation of the criminal statutes.

[9] The State's witnesses were Reverend J. W. Watson, Pastor of Lakeside Methodist Church in Pine Bluff, Carl Welch, a business leader of the city, B. E. Whitmore, County School Superintendent of Schools, Reverend Pirtle, Pastor of Second Baptist Church of Pine Bluff, Arthur C. Hendrix, Assistant Probation Officer of Jefferson County, and Norman Young, Chief of Police of the City of Pine Bluff.

Court are controlling, and, in conformity to the legal process, must be adhered to. But, as previously pointed out, we find no definite determination by a court majority that a "national standard" shall apply.

Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazine will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered. [fol. 332] Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree.

We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law.

The decree is modified to the extent that appellant *Gent* is made a party to this appeal, and, with such modification, said decree is affirmed.

Justice Johnson concurs. Justices George Rose Smith and Robinson dissent.

[fol. 333]

DISSENTING OPINION

SAM ROBINSON, Associate Justice:

Not only is it the duty of the United States Supreme Court to uphold the Constitution, but it is the duty of this court, and every court in the land, to support and defend the Constitution. Of course, any document as important as the Constitution has to be construed. It would be utterly impossible to write a Constitution for a great nation that would need no construction by courts of competent jurisdiction, and no one now questions the jurisdiction of the U.S. Supreme Court to construe the Constitution.

The First Amendment, as construed by the U.S. Supreme Court, among other things, protects the freedom of speech and freedom of the press. The Supreme Court has construed this Amendment many times but the majority of our court, in the case at bar, has cited only two cases on that point; neither of the cited cases sustain the majority opinion, and no other authority is cited sustaining the majority view. One of the cases cited by the majority is *Roth* v. *U.S.*, 354 U.S. 476. The facts in the Roth case are not shown, therefore it is not known whether it is analogous with the case at bar.

[fol. 334] The other case is *Jacobellis* v. *Ohio*, 378 U.S. 184. There, Jacobellis was convicted in the Ohio courts on two counts of possessing and exhibiting an alleged obscene film in violation of Ohio Statutes. The picture was a French film called "Les Amants" ("The Lovers"). The conviction was reversed by the U.S. Supreme Court. Here, the majority makes no attempt to point out any distinction between the Jacobellis case and the case at bar. Otherwise, the majority has not shown how it can be said that the material in the case at bar is obscene and therefore not protected by the First Amendment, notwithstanding what the U.S. Supreme Court has said in the Jacobellis case.

In view of the fact that undoubtedly this case will go to the U.S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U.S. Supreme Court in many cases, including *Times Film Corp.* v. *City of Chicago, et al,* 355 U.S. 35; *One, Inc.* v. *Olesen, Postmaster of Los Angeles,* 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield, Postmaster General,* 355 U.S. 372; *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U.S. 684; *Manual Enterprises, Inc.* v. *Day, Postmaster General,* 370 U.S. 478.

All of the foregoing cases are directly in point with the case at bar. There was a conviction in each case of violating some statute prohibiting dissemination of obscene material. In each case the alleged obscenity involved was lewd, lascivious, and perhaps shocking. In each case the conviction was reversed by the Supreme Court of the United States.

[fol. 335] The majority has made no attempt whatever to distinguish the alleged obscene material in the case at bar from the material that was in issue in the foregoing cases. There is no effort to show that the material involved here is any more obscene than the material that the Supreme Court has held to be protected by the First Amendment.

In my opinion the decision in this case will be reversed by the U.S. Supreme Court. I, therefore, respectfully dissent.

I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

[fol. 336] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 337]

IN THE SUPREME COURT OF ARKANSAS

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 24th day of May, A. D. 1965, a day of said term

No. 5-3529

GENT et al., Appellant,

vs.

THE STATE OF ARKANSAS, Appellee.

Appeal from Jefferson Chancery Court, First Division District.

LAW OR CHANCERY MANDATE—May 24, 1965

This cause came on to be heard upon the transcript of the record of the chancery court of Jefferson County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that the decree of said chancery court in this cause should be modified to the extent that appellant Gent is made a party to this appeal, and that as so modified the decree should be affirmed.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause be modified as above set out, and as so modified, in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof.

George Rose Smith and Robinson, JJ., dissent; Johnson, J., concurs.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 338]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

[Title omitted]

Appeal from the Jefferson County Chancery Court.

PETITION FOR REHEARING—Filed June 7, 1965

Petitioners, *Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir* magazines and their publishers, move that the Court grant a rehearing in captioned cause for the following reasons:

1. The Court erroneously based its determination of obscenity on local community standards instead of on the standards of the national community.

2. The Court used standards of obscenity not constitutionally permissible, thus denying petitioners their rights of free speech and freedom of the press and depriving them of their property without due process of law, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

3. The Court denied petitioners procedural due process in violation of the Fourteenth Amendment to the United States Constitution in refusing to consider offered evidence bearing on the establishment of community standards and in considering the testimony of witnesses on this question, when petitioners had been denied the right of proper cross-examination of these witnesses, in the Court's *de novo* determination that the magazines in suit are obscene.

[fol. 339] 4. The Injunction as issued by the trial court and approved by this Court constitutes in effect a prior restraint on publication in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

[File endorsement omitted]

5. The opinion of the Court leaves the erroneous impression that petitioners agreed that the Court should not consider procedural errors, when at all times, including in the oral argument, petitioners were urging that the Court consider these questions.

Wherefore, petitioners pray that they be granted a rehearing or, in the alternative, that the opinion be modified to state accurately that the Court refused to pass on the procedural errors, but not that this was done at the request of petitioners.

Robert C. Downie, Edwin E. Dunaway, Solicitors for Appellants.

Certificate

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. A copy has been served upon opposing counsel by mailing same on June 8, 1965.

Edwin E. Dunaway.

[fol. 340]

In the Supreme Court of Arkansas

[Title omitted]

Order Denying Rehearing—September 20, 1965

Petition for rehearing was denied in the above styled case.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 341]

State of Arkansas
In the Supreme Court.

Certificate

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition for rehearing in the case of Gent et al. v. The State of Arkansas, No. 3529, was

filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 7th day of December, 1965.
Philip N. Gowen, Clerk; By Oliver E. Cox, D.C.

[fol. 342]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

[Title omitted]

PETITION OF GENT MAGAZINE FOR REHEARING AND BRIEF

Appellant, Gent Magazine-Par Publications, Inc., respectfully petitions the Supreme Court of Arkansas for rehearing upon its decision in this case in the Opinion delivered herein on May 24, 1965, upon the following grounds:

1. The Court erroneously held that the U. S. Supreme Court did not apply a national community standard in the Jacobellis v. Ohio case. The U. S. Supreme Court decision reversed the Ohio courts which had applied a *local* community standard finding the material obscene. The United States Supreme Court held that it was not obscene and the concurring opinions cannot be construed as approving a local community standard.

2. The Court rejected a national community standard but did not establish what the local community standard for Pine Bluff was under the evidence in the case and applied an unconstitutional one.

(a) Although the Opinion referred to witnesses that testified, examination of their testimony shows that virtually all of their testimony related *only* to the effect on "young people." See R. 38, 39, 40, 42, 54, 68, 74, 76, 77, 78,

85. Applying the test of the effect on young people, does not comply with the holding in the Roth case or with the requirement of the Arkansas Statute that the effect be measured by the *average person* and not just young people.

(b) The Court did not decide the question as to the admission of evidence tendered by the Appellants in the Trial Court of Pine Bluff community standards. This evidence is described at page 37 and 38 of Gent's brief and R. 153 through 159. This evidence should have been admitted and its effect on the community standard considered with the other evidence in the Record.

(c) The Court should have taken into account the effect [fol. 343] of the Trial Court's erroneous limitation of defense's cross examination of witnesses to test the community standard by the witnesses against other materials available in the community (See R. 44, 45, 48, 49, 50 & 51). Since such cross examination was not permitted in the Trial Court, the Arkansas Supreme Court should evaluate the State's witnesses' testimony in the light of the other materials tendered by the defense or disregard their testimony.

3. The Court's Opinion misleadingly states that the Appellant requested that legal mistakes in the Trial Court be disregarded. The Appellant, Gent Magazine, was agreeable to have the case decided on the merits rather than remanded but not that the errors be disregarded. Failure to consider the errors resulted in a denial of due process of law.

4. Footnote 6 of the Opinion states that no effort was made to point out the differences in the various magazines. Gent Magazine argued separately from the other magazines that its contents were not obscene either by the dominant theme of the material or individual articles and discussed them in detail (See Gent's brief, pages 34-37). We submit that Gent Magazine should be separately evaluated.

Wherefore, the Appellant, Gent Magazine-Par Publications, Inc., pray for rehearing of this cause and that the

Court separately evaluate this Appellant's magazine on its own merits, and to find that said issue of the Appellant's magazine is not obscene and reverse and dismiss the case.

Gregory & Claycomb, by H. Murray Claycomb.

CERTIFICATE

Attorneys for Appellant Gent Magazine-Par Publications, Inc., Petitioner for rehearing, certify that they believe there is merit in the foregoing Petition for Rehearing and in the argument thereon, presented herewith, and said Petition is not filed for the purpose of delay.

Gregory & Claycomb, by H. Murray Claycomb,
Attorneys for Gent Magazine.

[fol. 344] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 345]

IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
September 20, 1965

Petition for rehearing was denied today in the following case.

3529. Gent v. State of Ark.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 346]

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition of the appellants, Gent

and Par Publications, Inc., for rehearing in the case of Gent, et al. v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 13th day of December, 1965.

Philip N. Gowen, Clerk.

[fol. 347]

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

No. 3529

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP., Appellants,

—against—

THE STATE OF ARKANSAS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—December 6, 1965

Sir:

I. Notice is hereby given that the above-named Gent, Swank, Bachelor, Cavalcade, Gentleman, Ace and Sir (Magazines), and Par Publications, Inc., Royal Publications, Inc., Magtab Publishing Corp., Skye Publishing Co. Inc., Bruce-Royal Publishing Co., Four Star Publications, Inc. and Volitant Publishing Corp., hereby appeal to The Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas dated May 24, 1965 and from its orders, each dated and entered on Sep-

tember 20, 1965 denying the applications of the appellants for a rehearing of same. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk of this court will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

[fol. 348] 1. This Notice of Appeal and proof of service thereof;

2. The judgment of the Supreme Court of Arkansas;

3. The appellants' petitions for a rehearing and the orders denying same;

4. Abstract and Brief for Appellants, and Supplemental Abstract and Brief for Appellant Gent Magazine Par Publications, Inc. filed in the appeals to the Supreme Court of Arkansas by the appellants;

5. The exhibits in evidence.

III. The following questions are presented by this appeal:

1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

3. Was the statute in question applied unconstitutionally in violation of the First and Fourteenth Amendments by providing a restraint upon the publication and distribution of future issues of the magazines?

4. Was Act 261 of The Arkansas Acts of 1961 unconstitutionally applied in this case in reaching the conclusion that the publications are obscene?

5. Are the publications in question obscene within the construction of the Fourteenth Amendment?

[fol. 349] 6. Was the Fourteenth Amendment violated by the appellee's failure to prove by scientific and competent evidence that the publications appeal to prurient interests as construed?

7. Was the Fourteenth Amendment violated by the failure of the Supreme Court of Arkansas to consider each magazine as a whole in determining that they are obscene?

8. Was the Fourteenth Amendment violated by the failure and refusal of the Supreme Court of Arkansas to refuse to accept evidence of community standards and to apply a national standard in adjudicating said publications as obscene?

9. Were the First and Fourteenth Amendments violated by the direction in the decree for the destruction of all copies of the issues of the magazine complained against possessed by appellants, whether such possession was in Jefferson County, Arkansas or in some other States of the United States?

10. Were the First and Fourteenth Amendments violated by the provisions of the decree restraining the possession of future issues of the magazines involved?

Dated: December 6, 1965.

Emanuel Redfield, Esq., Attorney for Appellants,
Office & P. O. Address, 60 Wall Street, New York
5, New York, HAnover 2-1023.

[fol. 350] Certificate of Service (omitted in printing).

[fol. 351] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 352]

SUPREME COURT OF THE UNITED STATES

No. 874—October Term, 1965

GENT et al., Appellants,

v.

ARKANSAS.

Appeal from the Supreme Court of Arkansas.

ORDER NOTING PROBABLE JURISDICTION—May 16, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted limited to Questions 1 and 2 presented by the jurisdictional statement which read as follows:

"1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden restraint on expression?

"2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?"

The case is placed on the summary calendar. As to the other questions presented, which are nonappealable, treating the papers as a petition for writ of certiorari, certiorari is denied. Mishkin v. New York, 383 U.S. 502, at 512-514.

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart would note probable jurisdiction without limitation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~[illegible]~~ 450

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

against

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT AS TO JURISDICTION

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IN THE

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ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT AS TO JURISDICTION

Opinions Below

The Supreme Court of Arkansas wrote an opinion which together with the dissenting opinion is appended hereto as Appendix A, and which are reported in 393 South Western Reporter, 2d 219. The trial court did not write an opinion.

Jurisdiction

(i) This case arises from a decree entered in the Jefferson County, Chancery Court, First Division of Arkansas, which found certain issues of the above-named magazines to be obscene, enjoined their distribution, decreed their destruction, directed the appellants to surrender all other copies of the issues for destruction, and retained jurisdiction to determine whether any future issues are obscene and whether or not they come within the terms of the decree and that any future issues will be enjoined upon a showing that the magazines are obscene, and to make such orders as may be necessary concerning the future sale of the above mentioned magazines.

(ii) The judgment of modification and affirmance was made and entered by the Supreme Court of Arkansas on May 24, 1965, Appendix B, *post,* 37. Timely petitions for a rehearing were filed in the Supreme Court of Arkansas on June 7, 1965, Appendices C, F, *post,* 39, 44. They were entertained and considered on the merits by that court, Appendices E, H, *post,* 43, 48. Their timeliness is certified by the court, Appendices E, H. The applications for a rehearing were denied by orders each dated and entered on September 20, 1965, Appendices D, G, *post,* 42, 47.

The Notice of Appeal was filed on December 10, 1965 in the Supreme Court of Arkansas, the court possessed of the record.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York,* 333 U. S. 507; *Dahnke-Walker Mill Co.* v. *Bondurant,* 257 U. S. 282; *Jacobellis* v. *State of Ohio,* 378 U. S. 184; *Department of Banking* v. *Pink,* 317 U. S. 264, 266; *Bowman* v. *Loperena,* 311 U. S. 262, 266.

Statutes Involved

The statute involved is Act No. 261 of the Laws of 1961, Ann. Stat. 41-2713-41-2728, which reads as follows:

"41-2713. Arkansas law on obscenity—Title.—This Act [§§ 41-2713—41-2728] shall be known as the Arkansas Law on Obscenity and may be referred to by that designation. [Acts 1961, No. 261, § 1, p. 935.]

41-2714. Purpose and intent.—The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State. [Acts 1961, No. 261, § 2, p. 935.]

41-2715. Definitions.—The following words, terms and phrases used in this Act [§§ 41-2713—41-2728] shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) 'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(4) 'Printed or written matter or material' means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution. [Acts 1961, No. 261, § 3, p. 935.]

41-2716. Possession, sale or distribution of obscene material unlawful—Penalty.—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give [gives] away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act [§§ 41-2713—41-2728], or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or materials, other than mailable mat-

ter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one [1] year, or both. [Acts 1961, No. 261, § 4, p. 935.]

41-2717. Action to determine obscenity of mailable matter.—Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter. [Acts 1961, No. 261, § 5, p. 935.]

41-2718. Complaint—Filing—Contents.—The action authorized in Section 5 [§ 41-2717] shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction. [Acts 1961, No. 261, § 6, p. 935.]

41-2719. Order to show cause—Service.—Upon the filing of the complaint described in Section 6 [§ 41-2718], the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [probable] cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probably [probable] cause to believe such mailable matter to be obscene, it shall issue an order to show cuase [cause] why the same shall not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of

a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section. [Acts 1961, No. 261, § 7, p. 935.]

41-2720. Answer, trial date.—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respondents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined. [Acts 1961, No. 261, § 8, p. 935.]

41-2721. Trial procedure.—The public interest requires that all actions prescribed in this Act [§§ 41-

2713—41-2728], other than criminal actions under Section 4 [§ 41-2716], be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions. [Acts 1961, No. 261, § 9, p. 935.]

41-2722. Judgment—Enforcement.—In the event the Courts [Court] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of such respondent wherever the same may be found. [Acts 1961, No. 261, § 10, p. 935.]

41-2723. Injunctions—Contents of order granting—Effect.—Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active consert or participation by

contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons, and in the same manner, as is provided in Section 7 [§ 41-2719] of this Act. [Acts 1961, No. 261, § 11, p. 935.]

41-2724. Mailable matter subject to provisions of act.—Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4 [§ 41-2716]. [Acts 1961, No. 261, § 12, p. 935.]

41-2725. Contempt.—Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 [§ 41-2723] and who shall disobey any of the provisions thereof shall be guilty of contempt of court. [Acts 1961, No. 261, § 13, p. 935.]

41-2726. Extradition.—In all cases in which a court has entered its judgment, pursuant to Section 10 [§ 41-2722], that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person

shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this state. [Acts 1961, No. 261, § 14, p. 935.]

41-2727. Possession creates a presumption.—The possession of any three (3) of the things enumerated in Section 4 [§ 41-2716] of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. [Acts 1961, No. 261, § 15, p. 935.]

41-2728. Non-resident—Consent to jurisdiction—Procedure.—In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5 [§ 41-2717]. [Acts 1961, No. 261, § 16, p. 935.]''

Questions Presented

1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

3. Was the statute in question applied unconstitutionally in violation of the First and Fourteenth Amendments by providing a restraint upon the publication and distribution of future issues of the magazines?

4. Was the Fourteenth Amendment violated by the failure and refusal of the Supreme Court of Arkansas to refuse to accept evidence of community standards?

5. Was the Fourteenth Amendment violated by the refusal of the Supreme Court of Arkansas to apply a national standard in adjudicating said publications as obscene?

6. Was Act 261 of The Arkansas Acts of 1961 unconstitutionally applied in this case in reaching the conclusion that the publications are obscene?

7. Are the publications in question obscene within the construction of the Fourteenth Amendment?

8. Was the Fourteenth Amendment violated by the appellee's failure to prove by scientific and competent evidence that the publications appeal to prurient interests as construed?

9. Was the Fourteenth Amendment violated by the failure of the Supreme Court of Arkansas to consider each magazine as a whole in determining that they are obscene?

10. Were the First and Fourteenth Amendments violated by the direction in the decree for the destruction of all copies of the issue of the magazine complained against

possessed by appellants, whether such possession was in Jefferson County, Arkansas or in some other states of the United States?

11. Were the First and Fourteenth Amendments violated by the provisions of the decree restraining the possession of future issues of the magazines involved?

Statement

The Attorney General of Arkansas commenced this action in the Jefferson County, Chancery Court, First Division, under Act 261 of 1961 of the laws of Arkansas against appellants, who are non-residents of Arkansas to have certain issues of the magazines in the caption of this action be declared obscene, enjoining their distribution and that the copies in the custody of the appellants be surrendered and destroyed (Ab. 6)*. The statute provides (Section VI) for the complaint to be directed against the magazine by name as well as the publisher or distributor, thus accounting for the names in the caption. The particular issues of the magazines involved are set forth in the Amendment to Complaint (Ab. 13).

The appellants answered, denied the obscenity of the issues of the magazine, and challenged the constitutionality of the statute on its face and as to its applicability (Ab. 9, 10, 15 and 16; S. A. 9).

The cause came on for trial before the court and an advisory jury. The jury held all the magazines to be obscene (Ab. 17). Thereupon a decree was entered against the appellants holding the magazines to be obscene, enjoining

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* Wherever "Ab." is used, it refers to pages of the record on appeal filed as "Abstract and Brief for Appellants" by all appellants other than Gent and Par Publications, Inc. The abbreviation "S.A." refers to "Supplemental Abstract and Brief" filed by appellants Gent and Par Publications, Inc.

their distribution in Jefferson County, directing the destruction of the magazines within ten days and retaining jurisdiction to restrain future issues of the magazines and to make any orders concerning future issues of the magazines (Ab. 17-21). The trial court refused to permit Gent to file an answer, and judgment went against it by default.*

The appellants appealed to the Supreme Court of Arkansas which by a vote of 5-2, modified the decree to the extent of permitting Gent and its publisher to be a party to the appeal, but affirmed as to all the substantive questions raised (Ab. 22, Appendices A, B). The appellants made timely applications for a rehearing, but which were denied on the merits (Appendices C, D, E, F, G, H).

Stage and Manner of Raising Federal Questions

The questions here presented were raised in the Supreme Court (Ab. 190, 160, 183, 187, 189; S. A. 6 and 12), in which appellants Gent and Par Publications, Inc. adopted and designated the record on appeal of the other appellants, 30-62; Opinions, Appendix A. Petitions for Rehearing, Appendices C, F (*post*, 39, 44),

The Supreme Court passed upon the questions, Opinions, Appendix A.

The questions were also raised at the trial by the pleadings, Ab. 9-11; by objections during the trial, Ab. 43, 48-50, 150, 152-153; by exceptions to the court's charge to the jury, Ab. 139, 140, 145, 146, 147, 148, 149, 150.

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* The Supreme Court held, however, that the Chancellor was in error and granted that magazine permission to argue in the appeal on the merits (Opinion, Appendix A).

The Questions Are Substantial

It should be noted that the judgment of the Supreme Court of Arkansas was decided by a vote of 5-2. Both the majority and minority wrote with an expectation that this court should ultimately decide this case. The majority observed (*post,* 33):

> "We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let here be said that, if a firm and clear guideline had been established, we should certainly follow it, for we recognize that the rulings of The United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But as previously pointed out, we find no definite determination by a court majority that a 'national standard shall apply'."

And in a prelude to these thoughts, that court said (*post,* 23):

> "In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion."

The dissenters said (*post,* 36):

> "In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases (citing cases).
>
> • • •

> In my opinion the decision in this case will be reversed by the U. S. Supreme Court. I, therefore respectfully dissent.
>
> I am authorized to say that Mr. Justice George Rose Smith joins in this dissent."

It will be noticed that the statute is most unusual in many parts, the pertinent ones being as follows:

1. The statute is mainly directed against out-of-state, non-resident publishers.

2. In its proscriptions against non-resident publishers the statute seeks to control the interstate movement of publications.

3. The orders and decrees provided by the statute reach into the home operations of the non-resident publisher.

Since this case is the first one under the statute, there are no constructions of it other than those found in this case.

The Supreme Court of Arkansas with respect to the attacks on the validity of the statutes said:

> "We do not agree with appellants that Section 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law."

A. The first attack upon the validity of the statute is that it seeks to draw within the ambit of the courts of Arkansas jurisdiction over non-resident publishers whose works are sent into Arkansas. In this, the statute is not limited to control over the purveyors of the publications

in Arkansas. It stretches out its arms to reach persons who have no business in the State other than that books and magazines are shipped there (Section 41-2714 and 2728). The exercise of such jurisdiction may result in a determination in that State that the magazines are obscene, by a national standard (although the magazines may pass approval in the state of publication or authorship or the federal mails, Section 2724) and the publisher directed (Section 2722 Sub. b, c) and as was done in this case to yield up all copies in possession of the appellants (Ab. 19, 21). In other words, under this statute and the decree in this case the courts are empowered to control the business operation and existence of publishers outside the state (2717). See also Section 2719 providing for service by mail of the order to show cause at the place of publication, and Section 2728 providing that by the very transmission of the publications into Arkansas the publisher submits himself to the jurisdiction of the state.

Taking the last, first, the statute in subjecting to the jurisdiction of such persons to the courts violates the First and Fourteenth Amendments in placing an onerous burden on the dissemination of literature. In requiring a non-resident publisher to submit to the control of the state into which publications may be sent, merely because they are sent there, interferes with the free flow of the literature.

Moreover, the provision of the statute authorizing a decree that would reach beyond state lines and compel a non-resident publisher to surrender under penalty of contempt (2725) and extradition (2726) all condemned copies owned by non-resident publishers is an intrusion into the field of publication that the Fourteenth Amendment condemns.

In this connection, it should also be noted that the non-resident publisher who ships "obscene" material shall be guilty of a felony, punishable by imprisonment not less

than one and up to five years and a fine of $2,000. The effect of such a statute is that if the laws of every one of the 49 states, other than the one of the publisher, had such a law, the non-resident publisher could be found guilty in each state for a felony (49 felonies in all on the shipping of a single issue of a single magazine), 49 times five years imprisonment = 245 years, and 49 times $2,000 in fines = $98,000. All of this because of the interstate shipment of a single issue of the literature in this case.

The appellants are publishers. All the publications enjoy second class mail privileges (Ab. 1, 8), and have nation-wide distribution (Ab. 1). The appellants are non-residents and were served by process by mail, pursuant to court order (Ab. 8, 9).

B. Closely associated with the foregoing vice of the statute is the unconstitutional application of the statute that resulted in an invasion of the freedom of publication. The decree directed that all copies of the issued proscribed shall be destroyed by appellants within ten days (Ab. 19). This had the effect of ordering these non-resident publishers, whose supply of the issues are not within Arkansas, to destroy them, even if their possession is lawful within the state of their residence. Failure of the appellants to comply would result in contempt (2725) and extradition (2726).

C. The statute was unconstitutionally applied. The publications in question are not obscene by any standard, whether national or local. They are the same type of publications, the "girlie" type, that passed muster by the Court of Appeals of New York in *People* v. *Richmond County News Inc.*, 9 N. Y. 2d 578, and which case was noted with approval in *Jacobellis* v. *Ohio*, 378 U. S. 184. Indeed, it was the *Gent* magazine, one of the magazines here, whose April 1957 issue was involved in the *Richmond County News* case, 9 N. Y. 2d 578 at 580. Certainly, these publications would meet the tests that were adequate in *Trailins*

v. *Gerstein*, 378 U. S. 576; *Grove Press* v. *Gerstein*, 378 U. S. 577; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372; *One, Inc.* v. *Oelsen*, 355 U. S. 371; *Times Film Corp.* v. *City of Chicago*, 355 U. S. 35; *Jacobellis* v. *Ohio*, 378 U. S. 184.

D. The statute was unconstitutionally applied in that the courts below (Ab. 139-141) refused to apply a national standard in determining whether the publications are obscene. The Supreme Court held that this court in *Jacobellis* did not hold that a *national* standard must be used. Consequently, that court refused to apply it, and said in its opinion that this court has created a confusion that it could not follow. This, without more, is reason enough to give substance and novelty to this appeal.

E. The statute was applied in violation of the Federal Constitution by the failure of the State to produce evidence of a scientific nature to demonstrate that the publications create pruriency. The burden is on the State to justify its restraint upon publications. *Freedman* v. *Maryland*, 380 U. S. 51. Consequently, the censor should produce the evidence which he claims supports his conclusion of appeal to pruriency. No such evidence was produced to support the conclusion reached by the court below that the magazines appeal to pruriency.

F. The trial court refused to accept evidence of community standards (Ab. 153, 43, 48-50; 101-103). This was affirmed by the Supreme Court. This court pronounced in *Smith* v. *California*, 361 U. S. 147 and in the *Jacobellis* case to the contrary that the accused in such a case may establish community standards. The appellants in making the offer to prove community standards proved to be generous. The burden of establishing community standards is on the one seeking to inhibit expression. The State failed to prove community standards.

G. Another novel and significant issue is presented by this appeal. In applying the *Roth* test that the publication must be judged *as a whole,* does the "whole" in a magazine mean the entire issue or only a whole story among several, in the magazine. The trial court held that the rule applied only to each separate article as a whole (Ab. 150, 146). We submit that this novel question must be resolved in favor of the appellant. What is at issue in the case is not the obscenity of any particular article or story in a magazine. It is the effect of the issue of the magazine that is sought to be condemned. Therefore, it is wrong to judge each article separately. The court in doing so, unconstitutionally applied the statute.

H. The trial court rendered its decree which still stands unchanged as to its substance. It provides that the court retains jurisdiction to determine whether future issues are obscene and whether they come within the terms of the order. This injunction against future issues of the same magazine is a plain violation of the rule in *Near* v. *Minnesota,* 283 U. S. 697 and *Kingsley Books* v. *Brown,* 354 U. S. 437, 441. The Attorney General and the Supreme Court realized the chancellor was wrong and sought to palliate it by an interpretation that would render the offending decretal words as surplusage. Of course, the chancellor was not a party to the fiction, for his words in the record demonstrate that he intended what he said—to enjoin all future issues. The following colloquy ensued (Ab. 152):

> "Mr. Dunaway (Appellant's then counsel): Did I understand the court correctly to say that the sale of these magazines is permanently restrained and the injunction *will not be* confined to the issues of the magazines which are in the suit? (Emphasis supplied.)
>
> The Court: That's right.
>
> * * * * * *

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients."

The decree is still unmodified in that respect and operates as a restraint. The Supreme Court did not strike that portion of the decree and it remains in force.

Conclusion

It has been shown that several novel questions of substance are found in this case which should be reviewed by this court. The most significant ones are: (1) The restraint exercised by the State of Arkansas on out-of-state publishers and compelling them to submit to its jurisdiction and to its control of the publishers' business; (2) These "girlie" publications, distributed nation-wide, with second class mailing privileges were held to be obscene by the unconstitutional application of the statute; (3) Are the community standards to be applied in judging the publication the standards of a village, county, state or nation; (4) Are magazines to be judged as a whole or article by article.

Any one of these novel issues is substantial to warrant the noting of probable jurisdiction. Collectively, they are even more compelling for review by this court.

Respectively submitted,

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APPENDIX A

Opinion.

HARRIS, Chief Justice.

[1] This appeal is from a decree of the Jefferson Chancery Court, holding that certain magazines were obscene. The court enjoined the appellants from sending, bringing, or causing to be brought, into Jefferson County for sale, exhibit, or gift, any of these magazines, and ordered them destroyed. Jurisdiction was retained to determine whether any future issues are obscene, and appellants were "notified that any future distribution of obscene publications, as set out, and found above, to be obscence, will also be restrained and enjoined and magazines will be removed." Included in the injunction were W. E. Burnham, Jr., county distributor of the magazines, and John Nickell, operator of a newsstand, which sold the magazines. The particular publications held to be obscene were Swank, Gent, Modern Man, Bachelor, Cavalcade, Gentlemen, Act, and Sir.[1]

The case arose upon complaint of the Prosecuting Attorney that the magazines were obscene, and in violation of Act 261 of the General Assembly of 1961 (Ark. Stat. Ann. § 41-2713-2728 [Repl. 1964]). The Chancellor impaneled, on motion of the state, an advisory jury, which, at the conclusion of an extended trial, unanimously found all magazines listed to be obscene. The court also found the magazines to be obscene, and issued its injunction. From the decree so entered, appellants bring this appeal.

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[1] Actually, this court would be justified in dismissing the appeals because of non-compliance with Rule 9. We recognize that the contents of the magazines could not be fully abstracted, but we know of no reason why copies of each magazine offered in evidence could not have been furnished for each judge to examine. The inconvenience occasioned by seven different judges examining the one copy of each magazine is obvious. However, because of the importance of, and interest in, the case, we have separately inspected the exhibits in order to reach a determination on the merits of the litigation.

[2] One preliminary matter needs to be disposed of. The court refused to permit Gent to file an answer, holding that the answer had not been tendered in time, and the judgment, as to this publication, was taken by default. We think the court erred. General counsel for the publication of Gent, in New York, wired the court on March 11, 1964, asking for a continuance, for the purpose of obtaining suitable counsel. The Chancellor replied by letter, acknowledging the telegram, and stating, "The cause was continued yesterday to be heard April 28, at 9:30 AM." Local counsel was subsequently retained, and tendered a response on April 24. We think the Chancellor's reply, which neither denied the request, nor indicated that the court had no authority to grant same, could well have been taken by New York counsel to mean that Gent had until April 28 to file an answer. Accordingly, appellant's request that it be made a party to this appeal, and that its argument on the merits of the appeal be considered by this court, is granted.

For reversal, seven alleged errors are asserted; however, some of these errors relate to the selection of, and instructions given to, the jury. Error is also asserted because of the court's refusal to admit into evidence other magazines and articles, as a matter of comparison, and the refusal to permit counsel to inquire from the state's witnesses whether they considered these other publications obscene. However, during oral argument before this court, counsel for all appellants requested that we make a determination on the merits, i.e., that we decide whether the magazines are obscene, rather than remand the case because of error committed during the trial. We therefore, do not consider the alleged errors heretofore mentioned. Suffice it to say that we agree that procedural error was committed, but in compliance with appellants' request, we disregard legal mistakes committed in selecting and instructing the jury,

and proceed to a discussion of the principal issue.[2] In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of the law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion.

In 1957, the United States Supreme Court decided the case of Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498. After holding that obscenity is not within the area of constitutionally protected speech or press, the court stated:

> "The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin [1868] L.R. 3 Q.B. 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.*[3] The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

Following this decision, a number of states, through their legislatures, adopted the italicized standard. In 1961, the

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[2] A jury in Chancery Court acts in an advisory capacity only, the court not bing bound by jury findings. In this case, both the jury and the Chancellor reached the same conclusion.

[3] Emphasis supplied.

Arkansas General Assembly passed Act 261, which defines the word, "obscene," in the exact language set forth in the Roth case.

Appellants, for reversal, rely upon the more recent case of Jacobellis v. State of Ohio, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed. 2d 793, and assert that this case makes clear that the "contemporary community standards," mentioned in Roth, actually refers to a "national" community, rather than a "local" community. Appellants vigorously argue that Jacobellis determined conclusively that the "national community standard" must be applied. We cannot accept this contention, since it does not appear that five judges, constituting a majority of the court, agreed upon the "national community" standard. The case was decided by a six to three vote, in which the lower court was reversed. There was no court opinion. Mr. Justice Brennan announced the decision, and wrote an opinion. Mr. Justice Goldberg concurred in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Douglas, Black, and Stewart concurred in the judgment of reversal, the first two on the basis that the Constitution does not permit censorship at all, and Mr. Justice Stewart, in a separate opinion, stating that the constitution only permits censorship of "hard core pornography;" further, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Mr. Justice White concurred in the judgment for reversal, without expressing a reason. The Chief Justice, joined by Justice Clark, in a dissenting opinion, rejected the national standard, which Justices Brennan and Goldberg stated the court must apply. Mr. Justice Harlan likewise dissented saying:

> "• • • The more I see of these obscenity cases the more convinced I become that in permitting the States

wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws * * * and protection of genuine rights of free expression. * * *"

Thus, it appears that only two justices of the prevailing six adopted the national community standard. It is therefore evident that a majority of the court, whatever may be the thinking, have not flatly said that the national standard must be applied. Much has been written about the Jacobellis case, and we think one of the most comprehensive articles (or notes) appears in 40 Notre Dame Law., P. 1 (Dec. 1964).[4] The article states:

"According to the opinion of Mr. Justice Brennan in Jacobellis v. Ohio, the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country—all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion."

After pointing out that, though critical, the writers intend nothing derogatory toward the court or its individual members, it is further stated:

"Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelopes the problem of obscenity as a result of the opinions in some recent

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[4] The note was prepared by Joseph O'Meara, Dean of the Notre Dame Law School, and Thomas L. Shaffer, Assistant Professor of Law of the Notre Dame Law School.

Supreme Court cases and the entire absence of opinion in others."

The article then notes that Justice Brennan sets out in his opinion that the Supreme Court must ultimately decide when a particular work is obscene, and the article poses the question of the logic of the court itself deciding obscenity cases when it does not decide for itself matters of equal or greater importance; for instance, whether a convicted murderer, when firing a fatal shot, was capable of distinguishing right from wrong, or was under a compulsion so strong that he was without power to resist it. These matters, of course, are determined by a jury. It is the opinion of the writers of the article that the Supreme Court, in deciding that it is the duty of the court to make its own independent decision of the issues in obscenity cases, has committed itself to an impossible task.

"Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

"As a matter of *fact* there is no national community standard. Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well. • • •

"• • • And to go back to population, the standard varies from one large city to another. Thus, it appears that practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

"Further examples of the *fact* that standards vary from one community to another come readily to mind.

Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? * * *

"Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say, Washington, D. C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

"Even as regards the big cities, there is no 'community standard.' There are many and conflicting standards; and our legal institutions provide judges no mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard. But that is historically the role and function of the jury. The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple.'"[8]

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[8] 13 Kan. L. Rev., P. 117 (1964), also contains an interesting article entitled "Obscenity: The Search for a Standard."

Appendix A.

Summarizing the views expressed in the several Jacobellis opinions, it is obvious that the court, in the final analysis, determines obscenity cases *de novo,* but the standard applied is not so readily apparent.

The stories and pictures in the eight magazines in question, in the main, deal with the theme of sex. The pictures generally portray side or back views of young females, totally unclad, or front views of the girls, unclad from the waist up. A large number of the stories, or articles, deal with adultery or fornication, the number varying in the several magazines.[6] In fact, all can be classified under the general term, "girlie" magazines. A few examples of the type of stories, or articles, found will illustrate the general theme. For instance, the following is an excerpt from a story in Ace, entitled "On the Level."

> "The window was open.
>
> "I tugged at the shade and it snapped up with a swich, and there I was gazing at the two most perfect breasts in creation. Full they were, and round and firm, and by any criterion, utterly fantastic. She was powdering them with a fluffy pink puff, and as the shade flew up she paused in mid-puff. • • •
>
> "She was lovely, but there was something wrong in the way she looked, in the tilt of her head, in the raven shimmer of her lustrous black hair, in the feline greenness of her eyes. And then I knew what it was—she was on her feet.

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[6] No effort is made in appellants' briefs to point out differences in the articles, or pictures, from the different magazines, i.e., one magazine might possibly contain obscene material, but another particular magazine does not. It is simply the contention of appellants that none of the magazines can be classified as obscene, under the law as declared by the United States Supreme Court; a separate argument is presented by Gent, which is represented by different attorneys.

Appendix A.

"Just as Goya's nudes would look ludicrous standing up, and Botticelli's undraped beauties would look foolish except lying down, so this chick was made for the horizontal; and while she was standing upright, I knew that on her back she'd be sensational. • • •

"We reacted to one another as if we were oppositely magnetized. My mouth was on her lips—moist, full, red lips. I've a thing for lower lips. The chick can be a dog as long as the lower lip is a full, soft one.

"She intertwined herself about me, nudely white from cascading raven hair to scarlet toenails, and the sensation was not of this world. I could feel the sleek perfection of her body through my clothes, her ruby-tipped breasts pushing against me impatiently. I felt her soft arms around me, under my arm-pits, as she hooked her exquisitely manicured hands at my shoulders, thrusting her dancer's belly toward me.

"And I suddenly realized that we were standing by the open window. Not only could we be seen in sharp relief against the white apartment walls by everyone in neighboring apartments, but my colleague, a fellow student, might come looking for me any moment. I pried loose, and the chick let go with low moans that set my hair climbing. I'd been right. She was the type that digs. What might have been foolish prematurity had turned out to be telling perception. She was a chick who thought 'horizontally.' • • •

"• • • What it was with her, I couldn't quite pin down, but she never made love in the dark, and always with the blinds up—and once while there was a girl friend in the living-room. It got to be a bit embarrassing. But she was a cool sketch, and she knew how to use that horizontal body of hers—*so well.* I didn't really give a damn."

Appendix A.

In Bachelor, a particularly obnoxious (to us) article appears, entitled "Those Free-Loving Coeds—Why Every Man Should Go To College." The opening paragraphs of this article (giving some idea of the nature of the remainder of the story) are as follows:

> "If you're a young man with plenty of initiative; zip and get-up-and-go, the place to be right now is in college. Just think of all the advantages. I don't mean the ordinary ones of being exposed to the great minds of science and the arts, learning from brilliant instructors and preparing yourself for a career. The advantages I'm talking about are even more important and have to do with meeting the most willing group of coeds ever to invade the campus scene.
>
> "The fact is, today's crop of college girls are not only loving more—but they are more lovable, too. And it all goes to give Joe College fonder memories of his Alma Mater to take with him when he graduates.
>
> "Only recently, for example, an anonymous senior from a large coed university in the middle-West was asked by an interviewer why his school had so few panty-raids in comparison with some of the all-male Eastern schools.
>
> "The senior grinned. 'Why *should* we have panty raids, here?' he asked. 'They are all right for guys who can't get enough of the real thing. The girls in this school, though, keep us perfectly happy and content'."

Again, in Ace, the story, "39 inches of Femme Fatale," commences as follows:

> "'You are a bitch!' Louise said.
>
> "'Yes, aren't I?' Carla Sanders laughed indulgently. 'And right here is 39 uptilted inches of bitchi-

ness that I intend to make pay off.' Insultingly she cupped her hands under her breasts."

From Cavalcade, "The Wrong Chimney":

"'Shh,' she murmered.

"She lifted his hand to cup her full breast, and turned a bit, her eyes closed, lifting her face to kiss him on the mouth, her rich lips parted. His hand felt her warm softness and moved of itself, amorously, his other hand automatically reached behind her, caressing, his mouth felt her warm lips and the tip of a tongue going into his, darting, exploring.

"She drew her face back a little, breathing fast, her eyes still closed. He looked at the lovely features he'd dreamed of so often looking just this way, with the same eager, surrendering expression, and reached for her again.

"'You were late,' she said softly. 'I was afraid . . . Don. . . .'

"She stopped talking as her mouth again met his. Then it penetrated . . . Don, she'd said. He started to draw back but he couldn't, he wanted her too much. He raised his hand a little to the back of her proud lovely neck and kept her mouth pressed to him. Then he thought . . . polite . . . proper . . . courteous . . . an officer and a gentleman, and pulled his seeking lips from her eager mouth.

"'Hurry,' she said, her eyes still closed, 'We only have a few minutes'."

We recognize that articles, or stories (and pictures), dealing with sex are not necessarily obscene. The material only becomes obscene when it deals with sex in a manner appealing to prurient interest. Of course, there

are frequently pictures or drawings in health and art magazines, which might be said to deal with sex, but such magazines would not be considered obscene, because their *dominant theme* relates to health or art. In Lockhart and McClure, "Censorship of Obscenity," 45 Minn. L. Rev. 5, Page 91, we find:

> "In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene. * * *"[7]

There are articles, or stories, in these eight magazines, which would not be considered obscene, but, in viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest.

[3] Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards

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[7] It is mentioned also that some pornographers "may seek to disguise the pornographic nature of the dominant theme of the materials they assemble, by the inclusion of some material that is clearly legitimate."

of Washington, New York, Chicago, or San Francisco,[8] nor is there any way for us to know the "standard" of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas.[9]

We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it, for we recognize that the rulings of the United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But, as previously pointed out, we find no definite determination by a court majority that a "national standard" shall apply.

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[8] The press carried an account, datelined San Francisco, May 9 of this year, as follows: "Bosoms were bared again Saturday as bawdy North Beach celebrated the acquittal of its topless dancers and fashion models.

"Two separate juries brought in the innocent verdicts Friday, vindicating nightclub owners and their busty showgirls of police charges of lewd conduct."

It is interesting to note that the trial judge, in directing the jury to return a verdict of not guilty, stated: "No police officer can substitute his personal feelings of what is right or wrong.

"The test is not what a couple of people feel. The test is what the people of San Francisco feel."

This occurrence points up the difference in the standards over the nation, for women appearing in this state in similar "attire" (or lack of it) would be in violation of the criminal statutes.

[9] The State's witnesses were Reverend J. W. Watson, Pastor of Lakeside Methodist Church in Pine Bluff, Carl Welch, a business leader of the city, B. E. Whitmore, County School superintendent of Schools, Reverend Pirtle, Pastor of Second Baptist Church of Pine Bluff, Arthur C. Hendrix, Assistant Probation Officer of Jefferson County, and Norman Young, Chief of Police of the City of Pine Bluff.

[4, 5] Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of a publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazines will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered. Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree.

[6] We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law.

The decree is modified to the extent that appellant Gent is made a party to this appeal, and, with such modification, said decree is affirmed.

JOHNSON, J., concurs.

GEORGE ROSE SMITH and ROBINSON, JJ., dissent.

Appendix A.

Dissenting Opinion.

ROBINSON, Justice.

Not only is it the duty of the United States Supreme Court to uphold the Constitution, but it is the duty of this court, and every court in the land, to support and defend the Constitution. Of course, any document as important as the Constitution has to be construed. It would be utterly impossible to write a Constitution for a great nation that would need no construction by courts of competent jurisdiction, and no one now questions the jurisdiction of the U. S. Supreme Court to construe the Constitution.

The First Amendment, as construed by the U. S. Supreme Court, among other things, protects the freedom of speech and freedom of the press. The Supreme Court has construed this Amendment many times but the majority of our court, in the case at bar, has cited only two cases on that point; neither of the cited cases sustain the majority opinion, and no other authority is cited sustaining the majority view. One of the cases cited by the majority is Roth v. United States, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. The facts in the Roth case are not shown, therefore it is not known whether it is analogous with the case at bar.

The other case is Jacobellis v. State of Ohio, 378 U.S. 184, 84 S. Ct. 1676, 12 L. Ed. 2d 793. There, Jacobellis was convicted in the Ohio courts on two counts of possessing and exhibiting an alleged obscene film in violation of Ohio Statutes. The picture was a French film called "Les Amants" ("The Lovers"). The conviction was reversed by the U. S. Supreme Court. Here, the majority makes no attempt to point out any distinction between the Jacobellis case and the case at bar. Otherwise, the majority has not shown how it can be said that the material in the case at bar is obscene and therefore not protected by the First

Amendment, notwithstanding what the U. S. Supreme Court has said in the Jacobellis case.

In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases, including Times Films Corp. v. City of Chicago et al., 355 U.S. 35, 78 S. Ct. 115, 2 L. Ed. 2d 72; One, Inc. v. Olesen, Postmaster of Los Angeles, 355 U.S. 371, 78 S. Ct. 364, 2 L. Ed. 2d 352; Sunshine Book Co. v. Summerfield, Postmaster General, 355 U.S. 372, 78 S. Ct. 365, 2 L. Ed. 2d 352; Kingsley International Pictures Corp. v. Regents of University of State of New York, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512; Manual Enterprises, Inc. v. Day, Postmaster General, 370 U.S. 478, 82 S. Ct. 1432, 8 L. Ed. 2d 639.

All of the foregoing cases are directly in point with the case at bar. There was a conviction in each case of violating some statute prohibiting dissemination of obscene material. In each case the alleged obscenity involved was lewed, lascivious, and perhaps shocking. In each case the conviction was reversed by the Supreme Court of the United States.

The majority has made no attempt whatever to distinguish the alleged obscene material in the case at bar from the material that was in issue in the foregoing cases. There is no effort to show that the material involved here is any more obscene than the material that the Supreme Court has held to be protected by the First Amendment.

In my opinion the decision in this case will be reversed by the U. S. Supreme Court. I, therefore, respectfully dissent.

I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

APPENDIX B

Law or Chancery Mandate

State of Arkansas,
In the Supreme Court } SCT.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 24th day of May, A. D. 1965, a day of said term

Gent, et al.
Appellant

No. 5-3529
vs.

The State of Arkansas
Appellee

Appeal from
Jefferson Chancery Court
First Division District.

This cause came on to be heard upon the transcript of the record of the chancery court of Jefferson County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that the decree of said chancery court in this cause should be modified to the extent that appellant Gent is made a party to this appeal, and that as so modified the decree should be affirmed.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause be modified as above set out, and as so modified, in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof.

GEORGE ROSE SMITH and ROBINSON, JJ., dissent; JOHNSON, J., concurs.

IN TESTIMONY, That the above is a true copy of the decree of said Supreme Court, rendered in the case therein stated, I, PHILIP N. GOWEN, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of November, A. D. 1965.

PHILIP N. GOWEN,
Clerk.

By JIMMY H. HAWKINS,
D.C.

APPENDIX C

SUPREME COURT OF ARKANSAS

No. 3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE, and SIR MAGAZINES,

Appellants,

v.

STATE OF ARKANSAS,

Appellee.

APPEAL FROM THE
JEFFERSON COUNTY CHANCERY COURT

Filed
June 7, 1965
PHILIP N. GOWEN
Clerk

PETITION FOR REHEARING

Petitioners, *Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir* magazines and their publishers, move that the Court grant a rehearing in captioned cause for the following reasons:

1. The Court erroneously based its determination of obscenity on local community standards instead of on the standards of the national community.

2. The Court used standards of obscenity not constitutionally permissible, thus denying petitioners their rights

of free speech and freedom of the press and depriving them of their property without due process of law, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

3. The Court denied petitioners procedural due process in violation of the Fourteenth Amendment to the United States Constitution in refusing to consider offered evidence bearing on the establishment of community standards and in considering the testimony of witnesses on this question, when petitioners had been denied the right of proper cross-examination of these witnesses, in the Court's *de novo* determination that the magazines in suit are obscene.

4. The injunction as issued by the trial court and approved by this Court constitutes in effect a prior restraint on publication in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

5. The opinion of the Court leaves the erroneous impression that petitioners agreed that the Court should not consider procedural errors, when at all times, including in the oral argument, petitioners were urging that the Court consider these questions.

WHEREFORE, petitioners pray that they be granted a rehearing or, in the alternative, that the opinion be modified to state accurately that the Court refused to pass on the procedural errors, but not that this was done at the request of petitioners.

ROBERT C. DOWNIE,
Robert C. Downie,
EDWIN E. DUNAWAY,
Solicitors for Appellants.

Appendix C.

CERTIFICATE

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. A copy has been served upon opposing counsel by mailing same on June 8, 1965.

EDWIN E. DUNAWAY.
Edwin E. Dunaway.

APPENDIX D

STATE OF ARKANSAS,
In the Supreme Court } SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 20th day of September, A. D. 1965, a day of said term

GENT, ET AL.
Appellant

No. 5-3529

Appeal from Jefferson Chancery Court District

VS.

THE STATE OF ARKANSAS
Appellee

5-3529. Gent et al. v. State of Ark.

Petition for rehearing was denied in the above styled case.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Philip N. Gowen, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 23rd day of November, A. D. 1965.

PHILIP N. GOWEN,
Clerk.

By JIMMY H. HAWKINS,
D. C.

APPENDIX E

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition for rehearing in the case of Gent et al v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 7th day of December, 1965.

Philip N. Gowen, Clerk

By OLIVER E. COX, D.C.
Oliver E. Cox

(SEAL)

APPENDIX F

IN THE SUPREME COURT OF ARKANSAS

GENT, ET AL — APPELLANTS

vs. — No. 3529

STATE OF ARKANSAS — APPELLEE

PETITION OF GENT MAGAZINE FOR REHEARING AND BRIEF

Appellant, Gent Magazine—Par Publications, Inc., respectfully petitions the Supreme Court of Arkansas for rehearing upon its decision in this case in the Opinion delivered herein on May 24, 1965, upon the following grounds:

1. The Court erroneously held that the U. S. Supreme Court did not apply a national community standard in the Jacobellis v. Ohio case. The U. S. Supreme Court decision reversed the Ohio courts which had applied a *local* community standard finding the material obscene. The United States Supreme Court held that it was not obscene and the concurring opinions cannot be construed as approving a local community standard.

2. The Court rejected a national community standard but did not establish what the local community standard for Pine Bluff was under the evidence in the case and applied an unconstitutional one.

(a) Although the Opinion referred to witnesses that testified, examination of their testimony shows that virtually all of their testimony related *only* to the effect on "young people". See R. 38, 39, 40, 42, 54, 68, 74, 76, 77, 78, 85. Applying the test of the effect on young people, does not comply with the holding in the Roth case or with the requirement of the Arkansas Statute that the effect be measured by the *average person* and not just young people.

(b) The Court did not decide the question as to the admission of evidence tendered by the Appellants in the Trial Court of Pine Bluff community standards. This evidence is described at pages 37 and 38 of Gent's brief and R. 153 through 159. This evidence should have been admitted and its effect on the community standard considered with the other evidence in the Record.

(c) The Court should have taken into account the effect of the Trial Court's erroneous limitation of defense's cross examination of witnesses to test the community standard by the witnesses against other materials available in the community (See R. 44, 45, 48, 49, 50 and 51). Since such cross examination was not permitted in the Trial Court, the Arkansas Supreme Court should evaluate the State's witnesses' testimony in the light of the other materials tendered by the defense or disregard their testimony.

3. The Court's Opinion misleadingly states that the Appellant requested that legal mistakes in the Trial Court be disregarded. The Appellant, Gent Magazine, was agreeable to have the case decided on the merits rather than remanded but not that the errors be disregarded. Failure to consider the errors resulted in a denial of due process of law.

4. Footnote 6 of the Opinion states that no effort was made to point out the differences in the various magazines. Gent Magazine argued separately from the other magazines that its contents where not obscene either by the dominant theme of the material or individual articles and discussed them in detail (See Gent's brief, pp. 34-37). We submit that Gent Magazine should be separately evaluated.

WHEREFORE, the Appellant, Gent Magazine—Par Publications, Inc., pray for rehearing of this cause and that the

Court separately evaluate this Appellant's magazine on its own merits, and to find that said issue of the Appellant's magazine is not obscene and reverse and dismiss the case.

GREGORY & CLAYCOMB,

By H. Murray Claycomb.

CERTIFICATE

Attorneys for Appellant Gent Magazine—Par Publications, Inc., Petitioner for rehearing, certify that they believe there is merit in the foregoing Petition for Rehearing and in the argument thereon, presented herewith, and said Petition is not filed for the purpose of delay.

GREGORY & CLAYCOMB,

By H. Murray Claycomb,
Attorneys for Gent Magazine.

APPENDIX G

Law or Chancery Mandate

State of Arkansas
In the Supreme Court } SCT:

Be it Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 4th day, being the first Monday of October, A.D. 1964, amongst others were the following proceedings, to wit:

On the 20th day of September, A.D. 1965, a day of said term

Gent, et al. — Appellant
No. 5-3529
vs.
The State of Arkansas — Appellee

Appeal from Jefferson Chancery Court District

Petition for rehearing was denied today in the following case.

3529. Gent v. State of Ark.

In Testimony, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Philip N. Gowen, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 6th day of December, A.D. 1965.

Philip N. Gowen, Clerk

By Jimmy H. Hawkins D.C.

APPENDIX H

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, PHILIP N. GOWEN, Clerk for the Supreme Court of Arkansas, certify that the petition of the appellants, Gent and Par Publications, Inc., for rehearing in the case of Gent, et al. v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 13th day of December, 1965.

PHILIP N. GOWEN,
Philip N. Gowen,
Clerk.

SUPREME COURT, U.S.

SEP 7 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OF APPELLANTS

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32 CASE PRESS INC., 421 Hudson St., N.Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO., INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL TO THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF OF APPELLANTS

Opinions Below

The Supreme Court of Arkansas wrote an opinion which is reported in 393 South Western Reporter 2d 219. The trial court did not write an opinion.

Jurisdiction

(i) This case arises from a decree entered in the Jefferson County, Chancery Court, First Division of Arkansas, which found certain issues of the above-named magazines to be obscene, enjoined their distribution, decreed their destruction, directed the appellants to surrender all other copies of the issues for destruction, and retained jurisdiction to determine whether any future issues are obscene

and whether or not they come within the terms of the decree and that any future issues will be enjoined upon a showing that the magazines are obscene, and to make such orders as may be necessary concerning the future sale of the above mentioned magazines.

(ii) The judgment of modification and affirmance was made and entered by the Supreme Court of Arkansas on May 24, 1965, Record page 40. Timely petitions for a rehearing were filed in the Supreme Court of Arkansas on June 7, 1965, R. 56, 58. They were entertained and considered on the merits by that court, R. 57, 60. Their timeliness is certified by the court, R. 57, 60. The applications for a rehearing were denied by orders each dated and entered on September 20, 1965, R. 57, 60.

The Notice of Appeal was filed on December 10, 1965 in the Supreme Court of Arkansas, the court possessed of the record, R. 61.

(iii) The jurisdiction of this court is conferred by 28 U.S.C. Section 1257(2).

(iv) The following decisions sustain the jurisdiction of this court to review judgments by appeal in this case: *Winters* v. *New York*, 333 U. S. 507; *Dahnke-Walker Mill Co.* v. *Bondurant*, 257 U. S. 282; *Jacobellis* v. *State of Ohio*, 378 U. S. 184; *Department of Banking* v. *Pink*, 317 U. S. 264, 266; *Bowman* v. *Loperena*, 311 U. S. 262, 266.

(v) Probable jurisdiction was noted by this court on May 16, 1966, limited to Questions 1 and 2.

Statute Involved

The statute involved is Act No. 261 of the Laws of 1961, Ann. Stat. 41-2713-41-2728, which is more fully set forth in Appendix A (p. 20 *post*):

Questions Presented

1. Is Act 261 of the Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of the Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

Statement

The Prosecuting Attorney for the Eleventh Judicial District, of which Jefferson County, Arkansas, is a part, on "probable cause" commenced this action in the Jefferson County, Chancery Court, First Division, under Act 261 of 1961 of the laws of Arkansas against appellants, who are non-resident publishers (R. 1-2) to have certain issues of the magazines in the caption of this action be declared obscene, enjoining their distribution and that the copies in the custody of the appellants be surrendered and destroyed (R 1.). The statute provides for the complaint to be directed against the magazine by name as well as the publisher or distributor, thus accounting for the names in the caption. The particular issues of the magazines involved are set forth in the decree (R. 28).

The appellants answered, denied the obscenity of the issues of the magazine, and challenged the constitutionality of the statute on its face and as to its applicability (R. 6-12).

The cause came on for trial before the court and an advisory jury. The jury held all the particular issues of the

magazines to be obscene (R. 27). Thereupon a decree was entered against the appellants holding the magazines to be obscene, enjoining their distribution in *Jefferson County*, directing the destruction of the magazines within ten days, and retaining jurisdiction to restrain future issues of the magazines and to make any orders concerning future issues of the magazines (R. 28). The trial court refused to permit Gent to file an answer, and judgment went against it by default.*

The appellants appealed to the Supreme Court of Arkansas which by a vote of 5-2, modified the decree to the extent of permitting Gent and its publisher to be a party to the appeal, but affirmed as to all the substantive questions raised (R. 30, 55). The appellants made timely applications for a rehearing, but which were denied on the merits (R. 56-61).

POINT I

The statute on its face is an unconstitutional restraint on interstate dissemination of literature.

By way of introduction it should be noted that the judgment of the Supreme Court of Arkansas was decided by a vote of 5-2. Both the majority and minority wrote with an expectation that this court should ultimately decide this case. The majority observed:

> "We know not what the United States Supreme Court may hold as to these magazines, or the validity

* The Supreme Court held, however, that the Chancellor was in error and granted that magazine permission to argue in the appeal on the merits.

of Act 261. Let here be said that, if a firm and clear guideline had been established, we should certainly follow it, for we recognize that the rulings of The United States Supreme Court are controlling, and, in conformity to the legal process, must be adhered to. But as previously pointed out, we find no definite determination by a court majority that a 'national standard shall apply'."

And in a prelude to these thoughts, that court said:

> "In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion."

The dissenters said:

> "In view of the fact that undoubtedly this case will go to the U. S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U. S. Supreme Court in many cases (citing cases). . . In my opinion the decision in this case will be reversed by the U. S. Supreme Court."

The Statute

It will be noticed that the statute is most unusual in many parts, the pertinent ones being as follows:

1. The statute is directed against out-of-state, non-resident publishers.

2. In its proscriptions against non-resident publishers the statute seeks to control the interstate movement of

publications and importation of them into Arkansas by mail and otherwise.

3. The orders and decrees provided by the statute reach into the home operations of the non-resident publisher.

Since this case is the first one under the statute, there are no constructions of it other than those found in this case.

The Supreme Court of Arkansas with respect to the attacks on the validity of the statute said:

> "We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law."

Section 2714 last sentence, states that among the purposes of the statute is to provide prosecuting attorneys "with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State."

In other words, the objective is not merely to control distribution of publications within the State of what is regarded as offensive literature, but in addition, seeks to reach out beyond state lines and control,

(a) composition of writings, and

(b) publication of writings.

To implement these objectives, the statute provides:

1. Consent to jurisdiction (Section 2728). Every non-resident shipper of books is deemed to have submitted him-

self to the jurisdiction of Arkansas by reason of having sent books there.

2. Provision is made (Section 2717) for the commencement of an action by the Prosecuting Attorney of any county into which such matter is sent for an adjudication of the obscenity of the "mailable matter". ("Mailable matter" is defined as that having second class mailing privileges or which has not been declared non-mailable under the laws of the United States, Section 2715(1)). Service of process may be made by registered mail on the non-resident (Section 2719).

3. Penalties.

(a) A person who sends into the State any obscene matter, whether previously adjudicated obscene under the Act or not, shall be guilty of a *felony*, and shall be fined no more than $2,000 or be imprisoned for not less than one year nor more than five years, or both fined and imprisoned (Section 2716).

(b) a court after determining that the character of a publication is obscene, may

(i) enjoin shipment of such matter into the State;

(ii) direct a sheriff of the state to seize and destroy all such matter *wherever* it may be found.

(c) Disobedience of the judgment shall be deemed a contempt Section 2725).

(d) Extradition of the non-resident for contempt is provided (Section 2726), and since a felony *prosecution* may be commenced, extradition for it may ensue.

The operation and effect of these statutes on non-residents can be determined from the facts in this case. The

appellants are all non-resident publishers (R. 1-2, 6). All appellants, except Bruce-Royal Publishing Co.—"Gentlemen", publish in New York, New York (R. 1-2). Their publications have nation-wide distribution. According to customs and practice distribution is made by a publisher to a nation-wide distributor who in turn has state and local wholesalers, or the publisher may distribute to state wholesalers, or the publication may be sent by mail from the publisher.

A publisher usually publishes in accordance with the law of the place of publication, whether the standard of the publisher's state be a local community standard or a national one. His guide is what is permitted by his place of operation. Yet under this Arkansas statute, the New York publisher becomes subject to a felony prosecution if a publication is mailed or shipped into a county of Arkansas, and subsequently determined there to be obscene. This proscription applies whether (a) it is shipped or mailed (Section 2716 subjects to penalty "other than mailable matter"). The criminal penalty under 2716 also applies when interstate shipments into a county are made subsequent to a judgment enjoining the material.

The appalling consequences to a publisher, and thus to the free movement of literature throughout the states, is not merely the power of a single county, as in this case, to bar the movement of literature interstate. What is worse, is that it provides a county with the power to put in prison a non-resident publisher who publishes in accordance with the standards of his home state. For the moment, let the argument confine itself to those situations in Section 2716 where the penalty applies to those publishers who ship or mail *before* an action has been commenced against them,

as was the case here. If all states other than the publisher's home state were to have similar laws, a publisher could not conduct his business. One shipment of a single issue of a magazine to all states other than that of publication could result in 49 convictions for 49 felonies, 245 years of imprisonment (5 years times 49 states) and $98,000 in fines, at $2,000 per state. And this does not take into account the separate power of each county within a state!

It needs no great exposition to demonstrate that under laws there is an unwarranted burden on publication in violation of the First Amendment. Were each state (and county) endowed with the power to erect the barrier to terrorize and intimidate out-of-state publishers there could be no free flow of ideas.

What was said above about matter other than "mailable matter", applies also in the case of mailable matter found by a court to be obscene and enjoined from shipment. Under the statute a decree does not only operate within the state but seeks to extend its power beyond state lines.

Under such laws a publisher with national distribution could not function. He could not anticipate what a particular state may subsequently determine obscene by its standards, as distinct from the standards of the state of origin. In terror of such laws, a publisher would be intimidated and discouraged from shipping.

Section 2722(a) allows an injunction against doing any act forbidden by the statute. This means that a decree could forbid a non-resident from preparing or possessing the materials that a county in Arkansas could forbid. This is not a remote possibility because the decree in this case enjoined appellants from (a) possessing any of the maga-

zines and (b) directed their destruction within ten days. And Section 2722(c) authorizes a sheriff to seize the publications in possession and control of a respondent *wherever* the same may be found.

Should the non-resident publisher fail to comply with the decree he becomes subject to contempt proceedings (2725) for which he may be extradited (2726). Thus, if appellants do not destroy the publications in their possession or refrain from distributing them, they might be extradited to Arkansas to answer a charge of contempt, all based on jurisdiction originally obtained by publication, as the statute permits (Section 2719).

The statute in this case cannot find support in *Kingsley Books Inc.* v. *Brown,* 354 U.S. 436. In that case, this court approved by 5 to 4 a statute which provided for injunctive proceedings against books found *within* the State of New York. That case with its species of censorship, should be reviewed by this court and overruled for the reason that it is a prior restraint, prohibited by *Near* v. *Minnesota,* 283 U.S. 697. In any event, the Arkansas statute goes beyond the New York law. Arkansas seeks to control the interstate shipment of literature, seeks to exclude the importation thereof into Arkansas and seeks to control the possession of the proscribed literature by the non-resident publisher. The difference is illustrated in *Bowman* v. *Chicago,* etc., 125 U.S. 465 and *Leisy* v. *Hardin,* 135 U.S. 100 where the court held that a state could regulate alcoholic beverages found within the state, but it could not exclude their importation into the state. See also, *International Textbook Co.* v. *Pigg,* 217 U.S. 91 as to regulation of a non-resident correspondence school.

In *Lovell* v. *Griffin*, 303 U.S. 444 this court affirmed that the distribution of literature enjoys the same protection as publication, because distribution is a necessary concomitant of publication. Yet this statute burdens the distribution of literature without end. It subjects to the jurisdiction of Arkansas every publisher who sends a piece of literature there (Section 2728). It makes no difference under that section of the statute what contacts, if any, and to what degree, a publisher may have with Arkansas. Mere shipment suffices. Such claim of jurisdiction rests on a fiction that it is the publisher who "imports" the material (2728). What effect such claim of jurisdiction can do to the free flow of thought as well as of commodities is well explained in Sobeloff, *Jurisdiction of State Courts Over Non-Residents in Our Federal System*, 43 Cornell L.Q. 196. See also, *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250, *International Shoe Co.* v. *Washington*, 326 U.S. 310, 318.

In this connection it should not be overlooked that by reason of the assertion of this jurisdiction the statute provides that although jurisdiction is obtained by publication, the State of Arkansas may nevertheless assert personal claims in the form of contempt proceedings and felony criminal prosecutions. Although the statute purports to empower *in rem* proceedings, it nevertheless operates *in personam*. Procedural due process is denied because provisions for notice to a non-resident publisher, without any contracts with Arkansas, are inadequate. The statute provides merely for service of the order to show cause by certified mail. Yet on the basis of such service the publisher becomes subject to fine and imprisonment. This court has held to the contrary: *McGee* v. *International Life Ins. Co.*,

355 U.S. 220, *Hanson* v. *Denckla,* 357 U.S. 235. See Restatement, Conflict of Laws, Section 77 (1948), 4 Pomeroy, Equity, Section 1317 (4 ed.).

The appellants do not rest their argument on this procedural deficiency. They merely point it up as part of the totality of defects in the statute which seeks to restrain publishers who are beyond the jurisdiction of Arkansas.

The Postal Laws

The statute seeks to control the shipment of publications by mail. (Sections 2715(1), 2716(1)(2), 2717, 2718, 2724). It is submitted that insofar as the statute seeks to regulate mail shipments, it is clearly in violation of the paramount powers of Congress with respect to the permitted restraints of publications under the First Amendment.

Arkansas has usurped the function of the post office in *explicitly* arrogating to itself the right to punish postal shipment that even the Post Office Department approved. The statute is directed against "mailable matter". "Such matter" is defined (2715(1)) as having second class mailing privileges. Why the state should single out and emphasize "mailable matter" for proscription from mailing is strange. But in doing so, it has extended its activities beyond its presently admissible authority to control *the publications* themselves found within its boundaries. In doing so, it has trespassed on the powers of Congress to regulate what is mailable or non-mailable. 18 U.S.C. 1461; Re *Jackson,* 96 U.S. 727; *Lewis Pub. Co.* v. *Morgan,* 229 U.S. 288; *Manual Enterprises, Inc.* v. *Day,* 370 U.S. 478; *Roth* v. *United States,* 354 U.S. 476. The national post office provides at least some uniformity as to what is mailable.

Cases demonstrating the determination of this court to uphold the policy of Congress to deny intrusion by the states into the postal service when broad policy of uniformity is at stake are: *Pensacola Tel. Co.* v. *Western, etc.*, 96 U.S. 1, in which a state monopoly to operate a telegraph business over post roads was denied as infringing upon Congress' power to regulate postal matters as well as interstate commerce; *Illinois Central Railroad* v. *Illinois*, 163 U.S. 142, which held unconstitutional an Illinois statute which required interstate mail trains to detour seven miles to reach a station. In those cases the conflict with national legislation or policy rendered state action invalid. See also, *Ex Parte Jackson*, 96 U.S. 727, 732, *Cooley* v. *Board of Wardens, etc.*, 12 How. 299; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250.

Interstate Commerce

By like reasoning the statute in seeking to inhibit and to punish interstate shipment of publications has invaded an area reserved to the federal government. The purpose of the commerce clause in the Constitution was to provide uniformity in regulation of shipments across state lines and to eliminate barriers against such activity. The Arkansas statute destroys that objective and thus trespasses into federal domain. *Bowman* v. *Chicago, etc.*, 125 U.S. 465 and *Leisy* v. *Hardin*, 135 U.S. 100, denied states the power to exclude the importation of alcoholic beverages from other states. What was said of alcoholic beverages applies with greater force to literature for this court has held that literature is of higher rank in constitutional protection than matters of the stomach. *Smith* v. *California*, 361 U.S. 147.

POINT II

The statute on its face and as applied is a vague restraint upon the press.

1. The statute proscribes "obscene" written material. It defines the word that to the average person, applying *contemporary community standards,* the dominant theme of the material taken as a whole appeals to prurient interest. What is wrong with the definition is that one cannot tell what is forbidden by the expression "contemporary community standards". Did it mean the standards of Jefferson County, Arkansas, where the action was brought and into which county the appellants were forbidden to forward their literature, or does it mean the State of Arkansas? If the United States is a community, then its standards should be applied. Certainly, the solution of this problem is of great significance to all shippers of literature across state lines. And its resolution is closely related to the arguments in Point I, insofar as it reveals the problem of a publisher who publishes in accordance with the standards of his state, yet is faced with discovery of standards of another state, not to mention the standards of a county of another state, as in this case.

The Supreme Court of Arkansas could not resolve this ambiguity. It refused to follow what was said in *Jacobellis* v. *Ohio,* 378 U.S. 184 as to a national standard, but fixed no definition itself (R. 46). The question therefore remains unsettled and the statute is as vague as when challenged in that respect (R. 7). Thus, a publisher cannot tell what is forbidden.

In stating, "but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary standards in Pine Bluff, Arkansas", the court below did not remove the ambiguity. It cannot be said that it now regarded the town of Pine Bluff, population 20,000, as the criterion of what may be transported into Arkansas. Indeed, that court's next sentence in the opinion (R. 51) discloses that it was not certain of its position.

A national standard seems to be indicated by the decisions.

Manual Enterprises, Inc. v. *Day*, 370 U.S. 48.
Jacobellis v. *Ohio*, 378 U.S. 184.
Excellent Publications, Inc. v. *United States*, 309 F. 2d 362.
State v. *Hudson County News Co.*, 41 N.J. 247.
Haldeman v. *United States*, 340 F. 2d 59.
State v. *Locks*, 97 Ariz. 148.
State v. *Vollmar*, 389 S.W. 2d 20 (Mo.).

2. Nevertheless, if it should be held that the statement of the court has removed the vagueness, there still remains the difficulty that a construction and application of the statute that inhibits interstate shipment into a state because of the standards of a town of 20,000 persons is an impermissible restraint on the press.

3. The statute is also vague in that it penalizes obscene written matter, "other than mailable matter" (2716(1)(2)). Assuming that we understand what obscenity means, there still remains the question as to what "other than mail-

able matter'' means. Does it mean literature that is transported by means other than the mail or does it mean mail that did not receive the approval of the Post Office Department? ''Mailable matter'' is defined in 2715(1) as material having a second class privilege or which has not been determined to be non-mailable by the United States. But excluding ''mailable matter'' does not produce clarity as to what ''other than mailable matter'' means. Accordingly, a publisher acts at his peril in guessing at what is forbidden.

POINT III

The statute was unconstitutionally applied

1. The trial court rendered its decree which still stands unchanged as to its substance. It provides that the court retains jurisdiction to determine whether future issues are obscene and whether they come within the terms of the order (R. 29). This injunction against future issues of the same magazine is a plain violation of the rule in *Near* v. *Minnesota,* 283 U.S. 697 and *Kingsley Books* v. *Brown,* 354 U.S. 437, 441. The Supreme Court realized that the chancellor was wrong and sought to palliate it by an interpretation that would render the offending decretal words as surplusage. Of course, the chancellor was not a party to the fiction, for his words in the record demonstrate that he intended what he said—to enjoin all future issues. The following colloquy ensued (R. 33 fol. 302):

> ''Mr. Dunaway (Appellants' then counsel): Did I understand the court correctly to say that the sale of these magazines is permanently restrained and

the injunction *will not be* confined to the issues the magazines which are in the suit? (Emphasis supplied.)

The Court: That's right.

* * * * *

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients."

The decree is still unmodified in that respect and operates as a restraint. The Supreme Court did not strike that portion of the decree and it remains in force.

2. The decree directed the appellants, publishing in New York and Connecticut to destroy all copies of the issues of the magazine within ten days (R. 29). Plainly, the statute so construed violates appellants' right to publish and possess books in New York, unhindered by the directions of a court in another state. Under New York law these publications would have been free of any objection (*People* v. *Richmond County News, Inc.*, 9 N.Y. 2d 578).

Failure of appellants to comply with this direction can lead to a charge of contempt (2725) and extradition (2726).

CONCLUSION

The judgment should be reversed.

It has been shown that the statute in question not only is a prior restraint upon the distribution of literature within a State, but goes farther, and seeks to control the movement of literature across state lines by mail and otherwise. Insofar as the statute is a prior restraint on distribution within the state, it should be stricken, even if it is necessary to overrule *Kingsley Books, Inc.* v. *Brown.*

Insofar as the statute seeks to control the movement of literature from non-resident publishers it is a violent restraint on the free flow of ideas nationwide, in that it intrudes into the postal powers which are exclusively that of Congress, and regulates interstate commerce which is reserved for the Federal Government at least insofar as a policy of a nationwide flow of literature requires. If interstate shipment of alcoholic beverages enjoys constitutional protection from state prohibition, by all the more reason such protection should be afforded to literature.

The statute is deficient in providing a heavy criminal *felony* penalty for its violation, yet is vague as to its definition of the standard to be used to determine what is obscene.

The statute has been unconstitutionally applied in that all future issues of the magazines in question were enjoined from distribution in Jefferson County. Moreover, the decree provided that these non-resident publishers are directed to destroy all copies of the magazines they may

possess, although by the laws of their domicile the magazines are not offensive.

For the foregoing reasons, the judgment should be reversed.

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APPENDIX A

Act No. 264 of the Laws of 1961, Ann. Stat. 41-2713-41-2728:

"41-2713. Arkansas law on obscenity—Title.—This Act [§§41-2713—41-2728] shall be known as the Arkansas Law on Obscenity and may be referred to by that designation. [Acts 1961, No. 261, §1, p. 935.]

41-2714. Purpose and intent.—The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State. [Acts 1961, No. 261, § 2, p. 935.]

41-2715. Definitions.—The following words, terms and phrases used in this Act [§§ 41-2713—41-2728] shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) 'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) 'Person' means any individual, partnership, firm, association, corporation or other legal entity.

(4) 'Printed or written matter or material' means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution. [Acts 1961, No. 261, § 3, p. 935.]

41-2716. Possession, sale or distribution of obscene material unlawful—Penalty.—(1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give [gives] away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act [§§ 41-2713—41-2728], or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter or materials, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one [1] year, or both. [Acts 1961, No. 261, § 4, p. 935.]

41-2717. Action to determine obscenity of mailable matter.—Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter. [Acts 1961, No. 261, § 5, p. 935.]

41-2718. Complaint—Filing—Contents.—The action authorized in Section 5 [§ 41-2717] shall be commenced by the filing of a complaint to which shall be

attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction. [Acts 1961, No. 261, § 6, p. 935.]

41-2719. Order to show cause—Service.—Upon the filing of the complaint described in Section 6 [§ 41-2718], the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [probable] cause to believe that the mailable matter described in the complaint is obscene,

the Court shall dismiss the complaint. If the Court finds probably [probable] cause to believe such mailable matter to be obscene, it shall issue an order to show cuase [cause] why the same shall not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section. [Acts 1961, No. 261, § 7, p. 935.]

41-2720. Answer, trial date.—(1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answer or other defense on or before the return date specified in the order to show cause, the court may forthwith determine

whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respondents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined. [Acts 1961, No. 261, § 8, p. 935.]

41-2721. Trial procedure.—The public interest requires that all actions prescribed in this Act [§§ 41-2713—41-2728], other than criminal actions under Section 4 [§ 41-2716], be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions. [Acts 1961, No. 261, § 9, p. 935.]

41-2722. Judgment—Enforcement.—In the event the Courts [Court] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the Court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the

possession or under the control of such respondent wherever the same may be found. [Acts 1961, No. 261, § 10, p. 935.]

41-2723. Injunctions—Contents of order granting —Effect.—Every order granting an injunction shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active consert or participation by contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons, and in the same manner, as is provided in Section 7 [§ 41-2719] of this Act. [Acts 1961, No. 261, § 11, p. 935.]

41-2724. Mailable matter subject to provisions of act.—Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4 [§ 41-2716]. [Acts 1961, No. 261, § 12, p. 935.]

41-2725. Contempt.—Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 [§ 41-2723] and who shall disobey any of the provisions thereof shall be guilty of contempt of court. [Acts 1961, No. 261, § 13, p. 935.]

41-2726. Extradition.—In all cases in which a court has entered its judgment, pursuant to Section 10 [§ 41-2722], that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this state. [Acts 1961, No. 261, § 14, p. 935.]

41-2727. Possession creates a presumption.—The possession of any three (3) of the things enumerated in Section 4 [§ 41-2716] of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor. [Acts 1961, No. 261, § 15, p. 935.]

Appendix A

41-2728. Non-resident—Consent to jurisdiction—Procedure.—In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5 [§ 41-2717]. [Acts 1961, No. 261, § 16, p. 935.]''

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAG-TAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

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GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAG-TAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP., *Appellants,* —*against*— THE STATE OF ARKANSAS, *Appellee.*	No. 50

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF *AMICUS CURIAE* OF THE COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

Statement

This brief *amicus curiae* is submitted on behalf of the Council for Periodical Distributors Associations, Inc. ("CPDA"), with the consent of all parties to this action, in support of the constitutionality of Act 261 of the Arkansas Acts of 1961 (hereinafter "the Arkansas Act" or "the Act").*

*CPDA has also filed a brief *amicus curiae* in support of petitioners' appeals in *Redrup* v. *New York* (No. 3) and *Austin* v. *Kentucky* (No. 16).

Interest of the *Amicus Curiae*

CPDA is a national trade association of more than 700 local independent wholesalers of magazines and paperback books. Its members distribute all leading magazines (for example, *Life, Newsweek, Look, Saturday Evening Post, Readers Digest* and *Woman's Day*) and all leading lines of paperback books (for example, Pocket Books, Bantam Books, Dell and New American Library).

Both as citizens and as small businessmen who are concerned with the image of the publishing industry, the members of CPDA are anxious to prevent the dissemination of obscene material. However, they are also concerned that the freedom of speech guaranteed by the First and Fourteenth Amendments may be negated by over-restrictive criminal obscenity legislation. In order to achieve a balance between the public interest in controlling obscenity on the one hand, and the right to freely publish and disseminate constitutionally protected and controversial literature on the other, CPDA vigorously supports the enactment of statutes, such as the Arkansas Act, which permit law enforcement officers to enforce obscenity laws through either injunctive or criminal proceedings.

It has been the experience of CPDA members that when a state's only weapon against obscenity is a criminal statute, officials are reluctant to prosecute, and obscenity actions are few and far between. There are two explanations for this reluctance. First, the state prosecutor knows that the local wholesaler handles thousands of publications, and that it is unjust to hold him criminally accountable for selling a book which he could not have possibly read and may not have even seen. Even if the prosecutor is unconcerned with the injustice of such a criminal prosecu-

tion, he may well be reluctant to proceed because of the difficulty in proving scienter.

Second, since local magazine and paperback wholesalers, such as the members of CPDA, are not criminals in any sense of the term, and are usually responsible community leaders, the local prosecutor (who frequently knows the local wholesaler) may be loath to injure the wholesaler's reputation by making him a defendant in a criminal action. For, whether the local wholesaler wins or loses the criminal action, his good name is besmirched by its mere commencement.

When state officials are reluctant to prosecute criminal obscenity laws, unscrupulus publishers and distributors—usually from outside the state, immune to local opinion and risking no local reputation—feel relatively free to disseminate obscenity.

However, it has also been the experience of members of CPDA that where there are no statutory provisions for injunctive proceedings against obscenity, local wholesalers and retailers, who are anxious to obey the law and who fear prosecution, will refrain from handling constitutionally protected controversial literature, thereby diluting the rights guaranteed by the First Amendment and curtailing the buyer's freedom to read.

The injunction provisions of the Arkansas Act effectively prevent the distribution of obscene literature without needlessly destroying the reputations of local businessmen and without, in any way, inhibiting First Amendment rights. Together with the criminal provisions of the Act, these injunction provisions give public officials two satisfactory tools with which to enforce obscenity laws.

If the Arkansas Act is held unconstitutional, comparable (in some instances, virtually identical) injunction statutes in at least 25 other states will fall with it or become very

suspect.* Based on their experience in the publishing industry, the members of CPDA believe that this would be a public and personal disaster which could serve only to (a) impede the distribution of constitutionally protected literature, (b) inhibit law enforcement officers from prosecuting obscenity laws, and (c) unfairly endanger their own reputations.

The Act

Purpose and Scope

The Arkansas Act is closely modeled upon a proposed anti-obscenity statute drafted and circulated by CPDA. The purpose of the Arkansas Act, as set forth in the Act itself (§ 2), and in the Introduction to the CPDA proposed statute, is: (a) to provide prosecuting attorneys with a

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*The following states have injunction statutes similar to the Arkansas Act:

Alabama (Ala. Code Tit. 14, § 374 (1961)); Arizona (Ariz. Rev. Stat. Ann. § 13-535 (1964)); Colorado (Colo. Rev. Stat. §§ 40-9-16 to 40-9-25 (1963)); Connecticut (Conn. Gen. Stat. Ann. §§ 53-244a to 53-244l (1963)); Florida (Fla. Stat. Ann. § 847.011 (1965)); Georgia (Ga. Code Ann. §§ 26-6301a to 26-6309a (1958)); Idaho (Idaho Code §§ 18-1506 to 18-1510 (1957)); Kansas (Kan. Gen. Stat. Ann. §§ 21-1102 to 21-1120 (1961)); Maryland (Md. Ann. Code, art. 27 §§ 418 to 418A (1951); 418B (1961)); Massachusetts (Mass. Ann. Laws, Ch. 272, §§ 28C to 28F (1945)); Michigan (Mich. Stat. Ann. § 27A. 2938 (1962)); Mississippi (Miss. Code Ann. §§ 2674-01 to 2674-19 (1962)); Missouri (Mo. Rev. Stat. § 563.285 (1965)); Nebraska (Neb. Rev. Stat. §§ 28-926.02 to 28-926.08 (1961)); New Jersey (N. J. Stat. Ann. §§ 2A:115-3.3 to 2A:115-3.9 (1962)); New York (N. Y. Code Crim. Proc. § 22-a); Ohio (Ohio Rev. Code Ann. § 2905.34.3 (1959)); Oklahoma (Okla. Stat. Ann. tit. 21, §§ 1040.1 to 1040.3 (1957)); Rhode Island (Rhode Island Gen. Laws Ann. §§ 11-31.1-1 to 11-31.1-12 (1963)); Tennessee (Tenn. Code Ann., § 39-3005 (1965)); Texas (Vernon's Ann. Penal Code. art. 527 (1961)); Utah (Utah Code Ann. §§ 76-39-5 to 76-39-15 (1963)); Virginia (Va. Code Ann. § 18.1-236.3 (1960)); Washington (Wash. Rev. Code, §§ 7.42.010 to 7.42.900 (1959)); Wisconsin (Wis. Stat. Ann., § 269.565 (1957)).

"speedy civil remedy for obtaining a judicial determination of the character and contents of publications"; (b) to provide prosecuting attorneys "with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene literature within" Arkansas; (c) to permit prosecuting attorneys to proceed by injunction proceedings as well as by criminal prosecution; and (d) to eliminate the situation under which the obscenity of a challenged publication can be tested only by a criminal action against a local wholesaler or retailer. (The Arkansas Act is set forth in Appendix A. The Introduction to the statute proposed by CPDA is set forth in Appendix B.)

The unfairness and irrationality of an exclusive criminal remedy is described in the Introduction to the CPDA proposed statute (p. A-11, *infra*):

> "To date, such challenge [concerning the obscenity or non-obscenity of a publication] has customarily been by criminal arrest and trial with its attendant and often unjustified odium. Whether the outcome of such trial results in the acquittal of the wholesaler or dealer is dependent in large measure upon his ability correctly to predict at the start of his distribution through his uninformed judgment the legal propriety of the publication in question, a hazardous occupation for which he has no training or desire to exercise a unilateral censorship."

The Arkansas Act provides both a criminal and civil remedy against the sale of obscene publications. Although the proceedings below concern the civil provisions only, and although the criminal provisions are not involved on this appeal, the arguments raised by appellants require a consideration of the Act as a whole.

Mailable Matter

Basic to the statutory scheme is the concept of "mailable matter". Under the Arkansas Act, a writing is "mailable" if it has "second class mailing privileges" or "has not been determined to be nonmailable under the laws of the United States". (§ 3 (1))

The Criminal Provisions

A criminal prosecution for the sale or distribution of an obscene publication, "with knowledge of its contents," can be brought only if the publication in question is nonmailable, or has been, to the defendant's knowledge, "judicially found to be obscene" in a prior Arkansas proceeding under the Act. Unlike the civil provisions, there are no provisions for criminal "long-arm" jurisdiction over out-of-state publishers or distributors. (§ 4; compare §§ 5 and 16) Extradition may be attempted only if: (a) the defendant has been a respondent in a prior civil proceeding brought under the Act; (b) an order was entered in that proceeding prohibiting the defendant from shipping into Arkansas specified publications which were found obscene in that proceeding; (c) the defendant is subsequently charged with *"continuing violations"* of that order; and (d) the order is not on appeal. (§§ 14, 11 and 10) (Emphasis added.)

The Civil Provisions—Actions to Determine Obscenity

A prosecuting attorney may commence an "action to determine obscenity" if he has reasonable cause to believe that any person, "with knowledge of its contents," is shipping a mailable obscene publication into Arkansas or is selling such a publication in that State. The respondents in the action are the persons responsible for the publication being sold in Arkansas. (§§ 5 and 6)

If, after a full adversary proceeding, the publication is found to be obscene, the respondents may be enjoined from further distribution of that publication in Arkansas, and respondents residing in Arkansas may be required to dispose of such publications. (§ 10) The injunction, which can only prohibit a respondent "from doing or continuing to do any act condemned by this Act," can, under the terms of the Act, have no extra-territorial effect. (§§ 10, 5 and 6(e)) Disobedience of any injunction entered pursuant to the Act constitutes contempt of court, but contempt, by itself, is not sufficient to permit the Governor to seek extradition. (§§ 13 and 14)

The Act does not permit any type of injunction *pendente lite*.

With respect to jurisdiction in civil proceedings, the Act provides that "in order to protect the morals and general welfare of the citizens and residents of" Arkansas against obscene matter "originating outside" the State, "persons who are responsible for the importation" of such obscene matter into Arkansas are subject to the jurisdiction of the Arkansas courts in any civil (not criminal) proceeding concerning that matter. Notice of such proceedings is sent to out-of-state respondents by registered or certified mail. (§ 7)

What the Act Does Not Provide

Appellants' characterization of the Act is at odds with the Act's clear language in several significant respects.

Appellants' contentions and suggestions to the contrary notwithstanding, the Act: (a) does not relate to non-obscene publications (5-6, 9, 10)*; (b) does not, in any way, affect the out-of-state operations of non-resident publishers or distributors (6, 9, 10, 17); (c) does not seek to

*All references in this paragraph are to Appellants' Brief.

control the composition and publication of writings in other states (6, 17); (d) does not subject non-residents to jurisdiction under the criminal provisions of the Act "by reason of having sent books" into Arkansas (6-7, 11) (the "long-arm" section of the Act applies to civil proceedings exclusively); (e) does not impose criminal penalties upon anybody for the shipment of "any obscene matter" (7, 8) (the criminal provisions may be invoked only if the publication is nonmailable, or has been previously adjudged obscene under the Act); (f) does not require out-of-state seizure of anything by Arkansas sheriffs (7, 10) (how could it?); and (g) subjects out-of-state publishers to felony prosecutions only if there has been a prior determination of obscenity (8).

No matter what appellants may say, the Act is nothing more than an attempt to control obscenity in Arkansas (and only in Arkansas) through a limited use of equity power and the criminal laws.

The Proceedings Below and the Decree Appealed From

The Prosecuting Attorney of the Eleventh Judicial District, Arkansas, commenced a civil proceeding under the Act to have the magazines in question declared obscene. The complaint sought relief against a retailer and wholesaler in Pine Bluff, Arkansas (and no one else) who are not appellants here. The complaint prayed that these local sellers (and no one else) be enjoined from distributing the magazines in question and be required to dispose of these magazines. (1-3)*

Although they were not named as defendants in the complaint, and although no relief was sought against them (1-3), the appellant publishers appeared and answered.

*Unless otherwise indicated, this, and all subsequent references, are to the record on appeal.

They challenged the constitutionality of the Act in general terms. They raised no specific objection to the statute's "long-arm" provisions however, and did not challenge the court's personal jurisdiction over them. (6-8, 11-12)

No preliminary injunction was sought or granted. (16)

After a full trial before a jury, each of the magazines in question was found obscene by the jury and by the court. (28-29) The court then entered a decree (28-30) enjoining defendants from sending the issues in question into Jefferson County, Arkansas, or from selling such issues in that county. The final paragraph of the decree provided that the court would enjoin distribution of future issues of the magazines *if* they were found to be obscene, and it retained jurisdiction for that purpose; however, the injunctive provisions of the decree did not in any way apply to future issues, and were limited to the issues specifically identified in the complaint.

The Position of CPDA

Ten questions were raised in the Notice of Appeal to this Court, but probable jurisdiction was noted on the first two only. These questions challenged the constitutionality of the Act on its face and as applied on the grounds that "it operates as a forbidden restraint on expression", and is "vague and uncertain". Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart stated that they would note probable jurisdiction without limitation. (62-64)

CPDA contends that, on its face and as applied, the Act does not operate as a restraint on expression and is not vague and uncertain. It is the position of CPDA, however, that the decree of the chancellor should be reversed on the grounds (a) that the publications in question are not obscene, and (b) that, in passing upon the question of obscenity, the jury and court should have considered con-

temporary community standards in the nation as a whole. See *State* v. *Keyhole Publishing Co.*, 3 Conn. Cir. 354, 214 A. 2d 838, *appeal dismissed*, 213 A. 2d 842 (1965), where the Appellate Division of the Circuit Court of Connecticut refused to pass upon the constitutionality of Connecticut's obscenity injunction statute because the publications in question were not obscene. See also *Jacobellis* v. *Ohio*, 378 U. S. 184 (1964), where this Court made an independent determination on the issue of obscenity, and *People* v. *Richmond County News, Inc.*, 9 N. Y. 2d 578 (1961), where magazines similar to those here involved were found non-obscene.

We would note that this is not a declaratory judgment action. The only matters actually at issue between the parties are the terms of an order entered pursuant to the Act. We would hope that the opinion of this Court would be limited to the issues actually involved in the case. See *Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO* v. *Missouri*, 361 U. S. 363 (1960); *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459-461 (1945). However, as appellants have raised arguments which go beyond the facts of the case, we shall attempt to deal with such arguments as well.

POINT I

THE ACT IS NOT UNCONSTITUTIONAL ON ITS FACE, OR AS APPLIED, IN THAT IT OPERATES AS A FORBIDDEN RESTRAINT ON EXPRESSION.

A. The Injunctive Provisions Are Constitutional on Their Face and as Applied.

1. The Purpose and Effect of Equity Proceedings

In any judicial proceeding concerning governmental regulation of obscenity, the central question is whether the regulation operates so as to impair the distribution of con-

stitutionally protected literature. *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963); *Butler* v. *Michigan*, 352 U. S. 380 (1957). The injunctive provisions of the Arkansas Act do not, and can not, have that effect. On the contrary, while criminal obscenity statutes can only serve to deter the sale of non-obscene literature dealing with sex, injunction proceedings (such as those involved here) will actually serve to remove inhibitions upon the distribution of constitutionally protected literature.

If obscenity is regulated by the criminal law alone, any publication dealing with sex poses a serious threat to the reputation and freedom of the publisher and distributor of that publication. The necessary indefiniteness of obscenity laws, and (in the case of distributors) the large number of publications handled, makes it virtually impossible for the ordinary businessman to determine whether many publications are obscene. Rather than run the grave risk of prosecution, many publishers and distributors will throw in the towel to the censors and abandon any literature dealing with sex. The result will be that a great deal of constitutionally protected literature will go undistributed and, perhaps, unpublished. This, in fact, is what is now happening in many areas of the country where criminal prosecution is the sole weapon against obscenity.

The Arkansas Act has the purpose and effect of enforcing the public interest in suppressing obscenity without simultaneously eroding the freedom of speech guaranteed by the First Amendment. Under this Act, a publisher or distributor can proceed with the knowledge that so long as he is handling material which is mailable (as defined in the Act), and which has not been judicially declared obscene by an Arkansas court, he is not subject to criminal prosecution. Freed from this fear, the publisher or distributor will not yield to anxieties concerning an

unwarranted criminal prosecution. The result here can only be a more free dissemination of constitutionally protected literature.

On the other hand, the Arkansas Act permits Arkansas to effectuate its public policy against the distribution of obscenity within its borders. If a publication is obscene, a speedy judicial determination can be had on the question of obscenity, and an injury to the public can be prevented without needless damage to anyone's reputation and without impairing free spech. If, in blatant defiance of its laws, a defendant handles obscene literature which is nonmailable, or which has been held obscene in a prior Arkansas action, the State can proceed under its criminal laws, provided that there is jurisdiction over the person. (As noted at pp. 6-8 above, the Act's "long-arm" provision applies to civil proceedings exclusively, and extradition can be attempted only under extraordinary circumstances.)

In addition, the presence of the injunction provisions promotes a more meaningful and thorough enforcement of obscenity laws since, for the reasons noted above (pp. 2-3), state prosecutors will generally be more willing to proceed under injunction statutes than under criminal statutes.

Arkansas has chosen this technique to protect its citizens from obscenity while preserving their constitutional rights of free speech. Although some may feel that the Arkansas technique is too lenient, while others may feel that it is too strict, the fact remains that it is reasonable and does not impair any constitutional rights. This, of course, is the test which must govern. See, Freund, The Supreme Court of the United States, p. 67 (Meridian Books ed., 1961).

2. The Scope and Effect of the Injunction

The injunction entered below was very narrow. It prohibited distribution of a single issue of seven magazines

found to be obscene, and it applied to one county only. If the publishers or distributors of these magazines believe that similar magazines or subsequent issues of the same magazines are not obscene, they can continue to sell these publications in Arkansas without fear of criminal prosecution. If they are wrong, and the other magazines are obscene, they may become subject to another injunction action. But, surely, this prospect will be less inhibiting than the prospect of a criminal prosecution, and, accordingly, much less likely to deter First Amendment freedoms.

3. Prior Authority

Kingsley Books, Inc. v. *Brown,* 354 U. S. 436 (1957), which upheld the constitutionality of section 22-a of the New York Code of Criminal Procedure, that State's obscenity injunction statute, is direct authority for the proposition that the injunction proceeding authorized by the Arkansas Act is constitutional. Indeed, the Arkansas Act does not go as far as the New York statute since section 22-a permitted an injunction *pendente lite* while the Arkansas Act does not. (An injunction *pendente lite* was entered in *Kingsley.*)

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. *Attorney General,* 383 U. S. 413 (1966) (hereinafter, *"Fanny Hill"*), seems to follow *Kingsley* in that this Court's opinion in *Fanny Hill* apparently approves of a Massachusetts obscenity injunction proceeding quite similar to the Arkansas proceeding here involved.

4. The Dissenting Opinions in *Kingsley*

The rationale of the dissenting opinions in *Kingsley,* if adhered to now, should not seriously challenge the constitutionality of the Arkansas Act. Five objections to New York Code of Criminal Procedure, section 22-a, were raised in the three *Kingsley* dissenting opinions. The first objec-

tion was that section 22-a permitted injunctions *pendente lite*. 354 U. S. at 445, 446 (opinions of Mr. Chief Justice Warren and Mr. Justice Douglas*). Since preliminary injunctions may not be had under the Arkansas Act, this problem can not exist here.

The second objection was that the section 22-a proceeding tried a book only, and did not focus upon the conduct of the individuals involved. *Id.* at 446-447 (opinions of Mr. Chief Justice Warren and Mr. Justice Douglas). The record in this case does not suggest that a book was tried rather than a person. The Arkansas Act is directed at persons and actions; it deals with "sending . . . selling, exhibiting or commercially distributing." (§ 5) The injunction below is binding only upon respondents, their agents, and those persons in active concert with them. (§ 11)

Moreover, in injunction and criminal proceedings under the Act, the Arkansas courts will (it should be presumed) take cognizance of the opinions of this Court and consider "the circumstances of production, sale, and publicity" in passing upon the question of obscenity. *Fanny Hill,* 383 U. S. at 420-421; see *Ginzburg* v. *United States,* 383 U. S. 463 (1966). There is no indication that they have not done this in the case at bar, and even if they did not do so, the omission is not caused by the statute.

The third objection raised against section 22-a was that it permitted destruction in the "absence of a prior judicial determination of illegal use." 354 U. S. at 446 (opinion of Mr. Chief Justice Warren). No matter what section 22-a may provide, a publication may be destroyed under the Arkansas Act only if it is found obscene at the close of a full adversary proceeding concerning its sale in or shipment into Arkansas. Moreover, only publications in

*Mr. Justice Black and Mr. Justice Brennan joined Mr. Justice Douglas' dissenting opinion.

the possession of resident respondents may be destroyed. (§ 10)

The fourth objection in the *Kingsley* dissents was that section 22-a did not treat every publication as "a separate offense which entitles the accused to a separate trial." *Id.* at 447 (opinion of Mr. Justice Douglas). Again, no matter how section 22-a may operate, it should be presumed that the Arkansas Act will be interpreted in light of the decisions of this Court, and that a defendant in an Arkansas injunction, contempt or criminal proceeding brought under the Act will not be enjoined or convicted if, because of different circumstances, a finding of obscenity is no longer warranted, even though such a finding had been made in a prior injunction action involving the same publication. See *Ginzburg* v. *United States, supra; Fanny Hill, supra.*

Moreover, although it is true that an injunction operates in the future, while a criminal conviction does not, and although it is true that a criminal defendant may be acquitted for the sale of a publication found obscene in a prior criminal action, the *in futuro* difference between criminal and civil obscenity proceedings is, at most, one in form. It is virtually inconceivable that a defendant convicted in Hot Springs will later try to sell the same publication in Little Rock. If, following a finding that he has sold an obscene publication, he is either convicted or enjoined, he will not, as a practical matter, sell that same publication again in that same state. If anything, the prospect of becoming a second (or third) offender will be more inhibiting than the prospect of contempt.

The fifth, and final, objection raised in the *Kingsley* dissents was that section 22-a did not provide a jury trial of right on the issue of obscenity. 354 U. S. at 447-448 (opinions of Mr. Justice Douglas and Mr. Justice Brennan). Although the Arkansas Act does not require a jury trial, the fact is that in the case at bar a jury found that defendants had sold obscene publications. Undoubtedly, the

same jury would have reached the same conclusion if it had been empanelled as a matter of right. (Experience indicates that juries are more likely than judges to find a particular publication obscene.)

In addition, *Mishkin* v. *New York*, 383 U. S. 502 (1966), and *Fanny Hill*, 383 U. S. 413 (1966), would seem to establish that juries are not indispensable in obscenity actions. In *Mishkin*, the defendant had no right to a jury trial and was convicted by a three-judge court; in *Fanny Hill* this Court found nothing objectionable about the non-jury equity proceeding below.

B. Neither the Act Nor the Order Below Affect the Publication, Possession or Distribution of Literature in any State Other than Arkansas.

Appellants argue that the Act, on its face, and as applied, seeks to operate outside of the State of Arkansas. (Appellants' Brief, pp. 5-11) Their argument ignores the clear language of both the Act and the decree.

No portion of either the Act or the decree, by its terms, has any extra-territorial effect. Indeed, section 10(a),* when read in conjunction with section 6(e),** clearly precludes any extra-territorial order.

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*Section 10(a) provides, in pertinent part:

"In the event the Courts [*sic*] finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do *any act condemned by this Act* . . . ." (Emphasis added.)

**Section 6(e) provides, in pertinent part:

"The action authorized in Section 5 shall be commenced by the filing of a complaint to which shall be attached as an

Although appellants suggest that the Act and order (apparently by implication) (a) require the destruction of publications outside of Arkansas (Appellants' Brief, p. 17) and (b) direct an Arkansas sheriff to seize publications in other states (Appellants' Brief, pp. 7, 10, 17), there is no suggestion that either appellants or the State of Arkansas have so interpreted the Act and order. It would be most surprising if, because of this action, appellants destroyed a single publication outside of Arkansas. It would be even more surprising if an Arkansas sheriff seized anything in any other state.

The few provisions of the Act and order which do not specifically define a geographical area should be interpreted as applying to Arkansas, at most. (The provisions of the order seem limited to Jefferson County.) In light of the purpose of the Act, and the well established limitations upon a state's power, any other interpretation would be illogical and contrary to established principles of statutory construction. *E.g., Kovacs* v. *Cooper,* 336 U. S. 77, 85 (1949); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932).

Moreover, even if the Act or order contained extra-territorial provisions (and they do not), and even if such provisions were unconstitutional, it would not follow that the Act is unconstitutional. If the order contained im-

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exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

* * * *

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, *into this State* for sale or commercial distribution, or *in this State* preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away. . . . (Emphasis added.)

proper extra-territorial provisions, then those provisions only would be invalid; the rest of the order would remain unassailable. If the Act contained improper extra-territorial provisions, this would not; under the Act's separability clause (§ 18), effect the constitutionality of the Act's other provisions.* *E.g., Champlin Refining Co.* v. *Corporation Comm'n,* 286 U. S. 210, 235 (1932).

Finally, it should be noted that Arkansas is not attempting to impose its views upon any other state. Assuming, *arguendo,* that a writing can be obscene in Arkansas and not obscene in New York, the Act does not in any way interfere with the right to publish, sell or read that writing in New York. On the contrary, but for the Act, publishers outside of Arkansas might be able to subvert that State's policies against obscenity. Indeed, if state statutes comparable to the Arkansas Act are unconstitutional, the standards of the most permissive state might well be imposed upon the other 49.

C. The Jurisdictional Provisions of the Act Are Constitutional.

It can no longer be seriously contended that there is an offense to "traditional notions of fair play and substantial justice" (the constitutional standard for subjecting non-residents to the jurisdiction of a state court) if out-of-state publishers, who ship obscene publications into Arkansas, are subject to the jurisdiction of Arkansas courts in civil injunction actions concerning those publications. *International Shoe Co.* v. *Washington,* 326 U. S. 310, 316 (1945); *Rosenblatt* v. *American Cyanamid Co.,* 15 L Ed. 2d 39 (opinion of Mr. Justice Goldberg on motion for a stay of judgment), *appeal dismissed,* 382 U. S. 110 (1965); Currie, "The Growth of The Long Arm", 1963 U. Ill. L. Forum

*The separability clause of the Arkansas Act is not set forth in the Appendix to Appellants' Brief.

533, 538-560. Given Arkansas' vital interest in effective enforcement of its obscenity laws, and given appellants' shipments into that state of publications found obscene, the limited civil "long-arm" provision of the Arkansas Act is reasonable and constitutional, both on its face and as applied. *International Shoe Co.* v. *Washington, supra*; *Travelers Health Assn.* v. *Virginia,* 339 U. S. 643 (1950); *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 (1957); *St. Clair* v. *Righter,* 250 F. Supp. 148 (W. D. Va. 1966).

The obscenity laws of Arkansas would be seriously undermined if those who shipped obscenity into that state could not be held accountable in Arkansas civil proceedings for so doing. To hold the Act's "long-arm" provision unconstitutional would be to require Arkansas to enforce its obscenity laws in the courts of other states. This makes bad law enforcement, bad federalism, and bad sense.

> "When a manufacturer—or any other seller—knowingly sends something into a state for his own economic gain, it does not seem unjust to expect him to answer there for the consequences. It would be odd if in a federal system Illinois could not enter a judgment against a man who stands in Indiana firing his gun at people in Illinois; the man who ships in unwholesome food is in no different situation." (Currie, *supra* at p. 549)

See the following cases in which, in actions involving their goods, out-of-state manufacturers were held to be proper parties in the courts of states into which they shipped. *S. Howe Co.* v. *W. P. Milling Co.,* 277 P. 2d 655 (Okla. 1954), *appeal dismissed by stipulation,* 348 U. S. 983 (1955) (cited with approval in *McGee* v. *International Life Ins. Co.,* 355 U. S. 220 at 223 n. 2 (1957)); *Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill.

2d 432, 176 N. E. 2d 761 (1961); *Singer* v. *Walker*, 15 N. Y. 2d 443, 464-467, 209 N. E. 2d 68, 80-82 (1965); *Nixon* v. *Cohn*, 62 Wash. 2d 987, 385 P. 2d 305 (1963); *McKee* v. *Brunswick Corp.*, 354 F. 2d 577 (7th Cir. 1965).

See also the following cases in which publishers were held subject to criminal suit, under the postal laws, in the states into which their publications were shipped: *United States* v. *Collier*, 183 F. Supp. 47 (E. D. Va.), *aff'd*, 283 F. 2d 780 (4th Cir. 1960), *cert. denied*, 365 U. S. 833 (1961); *United States* v. *Luros*, 243 F. Supp. 160 (N. D. Iowa), *cert. denied*, 382 U. S. 956 (1965); *United States* v. *Frew*, 187 F. Supp. 500 (E. D. Mich. 1960).

Furthermore, even if lack of personal jurisdiction could be seriously argued, these appellants should not be permitted to raise that issue. The record shows that the publisher appellants voluntarily appeared in this action, notwithstanding the fact that they were not named as defendants in the complaint. The record further shows that they never alleged lack of jurisdiction. (3-12) This, alone, should preclude any attack upon the constitutionality of the "long-arm" provision. *Head* v. *New Mexico Board of Examiners*, 374 U. S. 424, 433 n. 12 (1963); *Walters* v. *City of St. Louis*, 347 U. S. 231, 233 (1954).

D. The Act, on Its Face and as Applied, Does Not Interfere With Congress' Power to Regulate the Mails.

At pages 12 and 13 of their brief, appellants state that Act 261, in violation of the "paramount powers of Congress", (a) improperly "seeks to control the shipment of publications by mail", and (b) "single[s] out and emphasize[s] 'mailable matter' for proscription from mailing". This argument fails both on the facts and on the law.

1. The Absence of Interference With Federal Regulation

The Act applies only to publications which cannot be legally mailed (see 18 U. S. C. A. § 1461) or which have been found obscene by an Arkansas Court after a full hearing under section 4 of the Act. There is no reason to find or assume that the Act actually or potentially interferes with the mails, particularly since mailing of a publication found obscene under the Act would almost certainly violate federal law. (The definition of obscenity contained in the Act (§ 3(2)) is the same as the definition applied in federal prosecutions for mailing obscenity. *Roth* v. *United States*, 354 U. S. 476, 489 (1957).) Surely, the presence of a postage stamp cannot make a publication non-obscene, and nothing in the postal laws or postal regulations suggests that one purpose of the postal service is to impede a state's regulation of obscenity within its borders.

This issue was authoritatively resolved in *Alberts* v. *California*, 354 U. S. 476 (1957). There, the defendant argued that since he was using the mail extensively, the postal laws precluded California from impeding his activities. The Court considered the question "whether Congress, by enacting the Federal obscenity statute . . . pre-empted the regulation" of Alberts' activities by California. 354 U. S. at 480. Mr. Justice Brennan, writing the opinion of the Court, discussed and answered this question as follows:

> "Alberts argues that because his was a mail-order business, the California statute is repugnant to Art. I, § 8, cl. 7, under which the Congress allegedly pre-empted the regulatory field by enacting the federal obscenity statute punishing the mailing or advertising by mail of obscene material. The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material. The state

> statute in no way imposes a burden or interferes with the federal postal functions. '. . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulation involved a direct, physical interference with federal activities under the postal power or some direct, immediate burden on the performance of the postal functions. . . .' *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88, 96." (*Id.* at 493-494.)

The same rule should apply in the case at hand.

Neither the California statute upheld in *Alberts* nor the Arkansas Act in suit here prohibits the act of mailing. They prohibit only possession, distribution, etc. and, in the case of Arkansas, importation of obscene matter. Distribution and importation can be effected through many instrumentalities, of which the mail is only one. Appellants have advanced no arguments supporting the proposition that Arkansas' power to prohibit the dissemination of obscenity should not extend to the panderer who chooses to disseminate it in Arkansas through the mail.

Analogous situations are presented by state "Blue Sky" laws prohibiting the advertisement and sale of unregistered securities, and by state laws prohibiting the conduct of lotteries or the obtaining of money by fraud. The existence of the federal securities laws (15 U. S. C. A. §§ 77a-78gg) and federal statutes prohibiting the use of the mails for the conduct of lotteries (18 U. S. C. A. § 1302) or for fraudulent schemes (18 U. S. C. A. §§ 1341 and 1342) do not render such state statutes inoperative when the activities they prohibit are carried on through the mails.

As this Court said in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944):

> "It is settled that, for Constitutional purposes, certain activities of a business may be intra-state

> and therefore subject to state control, while other activities of the same business may be interstate and therefore subject to federal regulation and there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or taxed by the states. In marking out these activities, the primary test applied by the Court is not the mechanical one of whether the particular activity affected by the state regulation is part of interstate commerce, but rather whether, in each case, the competing demands of the state and national interests involved can be accommodated." (*Id.* at 548.) (Footnotes omitted.)

The postal laws do not make peddlers of obscenity any more immune from state regulation than those who use the mails to misrepresent securities, conduct lotteries or perpetrate frauds.

2. The Favored Treatment of Mailable Matter

It is true, as appellants contend, that Arkansas has singled out for special treatment literature which it has defined as "mailable matter". However, "mailable matter", as defined in the Arkansas Act, has been singled out by Arkansas not for proscription, but for special protection. As we have seen above, because of the statutory definition of "mailable matter", the criminal provisions of the Act can only be applied if the publication in question lacks second class mailing privileges *and* has been held nonmailable under the laws of the United States, unless it has, *to the defendant's knowledge*, been held obscene in a prior civil action under the Act. (§§ 3(1), 4, p. 6, *supra*)

Thus, Arkansas has accorded much greater deference to second class mailing privileges than have some other states, which give no special treatment to publications with such privileges—for example, Kentucky. See *Austin* v. *Kentucky* (Oct. 1966 Term, No. 16).

3. Appellants' Authorities

Appellants' authorities on the postal issue are not in point. (See Appellants' Brief, pp. 12-13) Re *Jackson*, 96 U. S. 727 (1877), *Lewis Pub. Co.* v. *Morgan*, 229 U. S. 288 (1913), *Manual Enterprises, Inc.* v. *Day*, 370 U. S. 478 (1962), and *Roth* v. *United States*, 354 U. S. 476 (1957), are merely cases which announce, or assume, that Congress has the power to regulate the use of the mails—a proposition which is not in dispute here.

In *Pensacola Tel. Co.* v. *Western*, 96 U. S. 1 (1877), and *Illinois Central R.R.* v. *Illinois*, 163 U. S. 142 (1896), the state regulation was directly contrary to the federal regulation—clearly not the case here, since Arkansas' regulation of obscenity is entirely consistent with federal regulation of that subject. See *Roth* v. *United States*, 354 U. S. 476 (1957); *Ginzburg* v. *United States*, 383 U. S. 463 (1966).

Grosjean v. *American Press Co.*, 297 U. S. 233 (1936), is similarly distinguishable since it involves a head-on interference with freedom of the press through the imposition of a direct tax upon newspapers. In the case at bar, of course, we are not dealing with constitutionally protected literature.

Finally, *Cooley* v. *Board of Wardens*, 53 U. S. 299 (1851), is, if anything, authority against appellants' postal law argument, since the Court there held that the commerce clause did not prohibit states from passing laws regulating pilots, in the absence of federal statutes clearly pre-empting the field.

4. Severability

Here also, even if appellants' contentions are correct, neither the Act nor the order must be stricken down in its entirety. If Arkansas cannot prevent out-of-state publishers from mailing into Arkansas literature found to be obscene in actions against those publishers, the order can be modified accordingly and the Act can be applied in the light of any such limitation. No matter what the postal laws may provide or require, those portions of the Arkansas Act and of the decree which have nothing to do with the mails should remain intact. See section 18 of the Arkansas Act; see also *Champlin Refining Co.* v. *Corporation Comm'n.*, 286 U. S. 210, 235 (1932).

E. The Act, on Its Face and as Applied, Does Not Interfere With Congress' Power to Regulate Interstate Commerce.

The Arkansas Act affects interstate commerce only insofar as it makes it a crime to send or bring nonmailable obscene matter into Arkansas (§ 4) and permits the State to obtain an injunction against the importation of obscene matter (§§ 5-6 and 10-11). The commerce clause does not prohibit this limited use of the State's police power. The law is clear that so long as the state regulation does not conflict with federal law, a state may, consistent with the commerce clause, prohibit the importation of material which it reasonably determines to be dangerous to the health or welfare of its citizens. *Asbell* v. *Kansas;* 209 U. S. 251, 256-258 (1908); *Reid* v. *Colorado,* 187 U. S. 137 (1902); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548-549 (1944).

Appellants have not cited, and we have not discovered, any federal legislation in conflict with Arkansas Act. As in *Asbell* v. *Kansas, supra,* the comparable federal legis-

lation (18 U. S. C. A. § 1461) is fully consistent with the state legislation. Given the absence of conflicting federal legislation, and given the right of the states to prevent the distribution of obscenity pursuant to their police power (*e.g., Mishkin* v. *New York*, 383 U. S. 502 (1966)), the Arkansas Act is unassailable under the commerce clause.

The cases cited by appellants in support of their commerce clause argument (Appellants' Brief, p. 13) are not in point. Both *Bowman* v. *Chicago & N. W. Ry.*, 125 U. S. 465 (1888) and *Leisy* v. *Hardin*, 135 U. S. 100 (1890) involved state statutes prohibiting the importation of intoxicating liquors as such into the states in question, with certain narrow exceptions. They would be in point if the Arkansas Act sought to prevent the distribution of obscenity within Arkansas by prohibiting the importation of *all* matter dealing with sex. The Act does not do this however; it merely prohibits the importation of certain obscene matter, and is therefore analogous to the quarantine cases cited above (*Asbell* v. *Kansas*, *supra*; *Reid* v. *Colorado*, *supra*), and not to appellants' liquor cases.

Appellants' argument that "what was said of alcoholic beverages [in the *Bowman* and *Leisy* cases, *supra*] applies with greater force to literature" is completely inapposite since the Arkansas Act does not deal with "literature", but only with "obscene matter" which, this Court has held, enjoys no constitutional protection at all. *Roth* v. *United States*, 354 U. S. 476 (1957).

Finally, once again, even if appellants were right, they would be entitled to no more than a holding that the decree and Act may not prohibit shipments from outside of Arkansas into Arkansas, provided that the shipments do not violate federal law. Those portions of the Act and decree which regulate sale and possession entirely within Arkansas should not be affected by any holding pursuant to the commerce clause.

POINT II

THE STATUTE IS NOT VOID FOR VAGUENESS.

Appellants contend that the terms "obscenity" and "other than mailable matter" are vague (Appellants' Brief, pp. 14-16). It is not clear whether they further contend that this alleged vagueness makes the statute unconstitutional. But, whatever they may contend, these terms pose no constitutional problem.

The statute's definition of "obscenity" is taken verbatim from the definition in *Roth* v. *United States,* 354 U. S. 476, 489 (1957). There is less vagueness in the Arkansas Act's use of the term "obscenity" than there is in the statutes involved in *Alberts* v. *California,* 354 U. S. 476, 479-480, n. 2 (1957), *Mishkin* v. *New York,* 383 U. S. 502, 503, n. 1 (1966), *Ginzburg* v. *United States,* 383 U. S. 463, 464-465, n. 2 (1966), and *Fanny Hill,* 383 U. S. 413, 421-422 (1966).

As appellants note, the Act does not state whether the appropriate "community" for "applying contemporary community standards" is local or national. However, this problem has not been resolved by a majority of this Court, and statutes which do not define this "community" have been upheld by this Court. *Roth* v. *United States, supra; Alberts* v. *California, supra; Mishkin* v. *New York, supra; Ginzburg* v. *United States, supra.*

We agree with appellants that a national standard should be required. However, even if the Court is now prepared to declare that the standard is national, it would not follow that the Act's definition of obscenity must be held unconstitutionally vague. The question of definition can be resolved—and this appeal fairly disposed of—by holding that in future proceedings under the Act the "com-

munity" must be national, and by further holding that the decree below is invalid since the standards of a local community may have been applied.

The objection concerning the term "other than mailable matter" seems frivolous. It is hard to see how a statutory definition could be more clear or precise:

> "(1) 'Mailable matter' means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States." (§ 3)

Lest there be any doubt, "other than mailable matter" means that which is not mailable.

Moreover, even if there were some ambiguity in either of the terms complained of, *Roth* v. *United States, supra,* would fully dispose of appellants' objections:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .' *United States* v. *Petrillo,* 332 U. S. 1, 7-8." (354 U. S. at 491)

POINT III

THE DECREE DOES NOT ENJOIN THE DISTRIBUTION OF FUTURE ISSUES AND THE ACT DOES NOT PERMIT ANY SUCH INJUNCTION.

Appellants contend that there is an "injunction against future issues". (Appellants' Brief, p. 16) This is just not so.

Although the trial judge indicated during colloquy on April 29, 1964, that he might enjoin future issues (33), the injunctive provisions of the decree, which are dated May 13, 1964, are limited to the specific issues introduced into evidence, and do not in any way relate to future issues (28-30). (Between the date of the colloquy and the date of the decree, the trial judge apparently determined that, no matter what he might have said, he could not enjoin future issues; he obviously framed his decree accordingly.)

It is the decree which restrained appellants and which is being appealed from, not any pre-decree colloquy between court and counsel. Moreover, if there were some doubt concerning the scope of the decree, the holding of the Supreme Court of Arkansas that the decree "does not enjoin future issues" should put the question to rest. *Gent* v. *Arkansas*, 393 S. W. 2d 219, 226 (1965).

Of course, even if the decree did apply to future issues, the remedy would be to strike that portion of the decree only, and to leave the balance of the decree—and the Act—otherwise intact.

CONCLUSION

In 1961 Arkansas, by enacting the statute here under attack, sought to protect its citizens from obscenity without, in any way, limiting the freedoms guaranteed to them by the First and Fourteenth Amendments. Adhering closely to the decisions of this Court, Arkansas did this by providing for both civil and criminal proceedings. Many other states have followed a similar course. (See p. 4, above.) We respectfully submit that Arkansas has solved this difficult problem with precision and delicacy, and with due regard for the interests of its citizens and the requirements of the Federal Constitution as interpreted by this Court. Arkansas' regulatory scheme does not impede First Amendment Freedoms, while an exclusive criminal remedy would. It should not be stricken down.

The Arkansas Act should be declared constitutional. However, the decree should be vacated on the grounds (a) that the publications in question are not obscene, and (b) that the "contemporary community standards" of the nation should have been applied.

Respectfully submitted,

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Appendix A

ARKANSAS ACTS OF 1961

ACT 261

* * * * *

SECTION 1. This Act shall be known as the Arkansas Law on Obscenity and may be referred to by that designation.

SECTION 2. PURPOSE AND INTENT OF ACT. The General Assembly hereby determines that during the past several years, the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of this State against those publications are in the best interests of the morals and general welfare of the people. The accomplishment of these ends can best be achieved by providing prosecuting attorneys both with a speedy civil remedy for obtaining a judicial determination of the character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene publications within the State.

SECTION 3. DEFINITIONS. The following words, terms and phrases used in this Act shall, for the purpose of this Act, have the meanings respectively ascribed to them in this Section:

(1) "Mailable matter" means (a) printed or written matter or material having second class mailing privileges under the laws of the United States; or (b) any other printed or written matter or material which has not been determined to be nonmailable under the laws of the United States.

(2) "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

(3) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(4) "Printed or written matter or material" means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story paper or other printed or written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution.

SECTION 4. CRIMINAL PROVISIONS. (1) Every person who, with knowledge of its contents, sends or causes to be sent, or brings or causes to be brought, into this State for sale or commercial distribution, or in this State prepares, publishes, sells, exhibits or commercially distributes, or give away or offers to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or to give away, any obscene printed or written matter or material, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act, or who knowingly informs another of when, where, how or from whom or by what means any of these things can be purchased or obtained, shall be guilty of a felony, and upon conviction thereof shall be fined not more than $2,000.00 or be imprisoned for a period not less than one (1) year nor more than five (5) years, or be both so fined and imprisoned.

(2) Every person who, with knowledge of its contents, has in his possession any obscene printed or written matter

or materials, other than mailable matter, or any mailable matter known by such person to have been judicially found to be obscene under this Act shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000.00 or be imprisoned in the county jail for a period not to exceed one year, or both.

SECTION 5. MAILABLE MATTER, COMMENCEMENT OF ACTION. Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person, with knowledge of its contents, is

(1) Engaged in sending or causing to be sent, bringing or causing to be brought, into this State for sale or commercial distribution, or is

(2) In this State preparing, selling, exhibiting or commercially distributing, or giving away, or offering to give away, or has in his possession with intent to sell or commercially distribute or to exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting Attorney for the county into which such mailable matter is sent or caused to be sent, brought or caused to be brought, or in which it is prepared, sold, exhibited or commercially distributed or given away or offered to be given away, or possessed, shall institute an action in the Chancery Court for that county for an adjudication of the obscenity of the mailable matter.

SECTION 6. ACTION TO DECLARE MAILABLE MATTER OBSCENE. The action authorized in Section 5 shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly obscene mailable matter. The complaint shall:

(a) be directed against the mailable matter by name or description;

(b) allege its obscene nature;

(c) designate as respondents and list the names and addresses, if known, of its author, publisher, and any other person sending or causing it to be sent, bringing or causing it to be brought into this State for sale or commercial distribution and of any person in this State preparing, selling, exhibiting or commercially distributing it or giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(d) pray for an adjudication that it is obscene;

(e) pray for a permanent injunction against any person sending or causing it to be sent, bringing or causing it to be brought, into this State for sale or commercial distribution, or in this State preparing, selling, exhibiting or commercially distributing it, giving away or offering to give it away, or possessing it with intent to sell or commercially distribute or exhibit or give away or offer to give it away;

(f) pray for its surrender, seizure and destruction.

SECTION 7. ORDER TO SHOW CAUSE. Upon the filing of the complaint described in Section 6, the Prosecuting Attorney shall present the same, including the exhibit thereto, as soon as practicable to the Court for its examination. If there is no probably [*sic*] cause to believe that the mailable matter described in the complaint is obscene, the Court shall dismiss the complaint. If the Court finds probably [*sic*] cause to believe such mailable matter to be obscene it shall issue an order to show cause why the same shall

not be adjudicated obscene, returnable not less than ten (10) days after its service, directed against the mailable matter by name or description and directing the service of a copy thereof, together with a copy of the complaint upon such mailable matter and upon each of the respondents named in the complaint. Service of such order shall be made upon such mailable matter at its place of publication or its editorial offices as shown therein. Service of such order or any copy thereof may be made in any manner provided by law, and in case of mailable matter published or edited outside of the State of Arkansas and of any non-resident respondent, by registered or certified mail directed to the mailable matter of the respondent to be served at the address shown in the complaint. Proof of such mailing shall be deemed to be prima facie evidence of service of such rule or a copy thereof upon the mailable matter or any respondent for the purposes of this Section.

SECTION 8. ANSWER, TRIAL DATE. (1) On or before the return date specified in the order to show cause, the mailable matter and each respondent may file answers or other defenses.

(2) The court may, by order, permit any person to appear and file an answer as amicus curiae.

(3) If no person files an answers or other defense on or before the return date specified in the order to show cause, the court may forthwith determine whether the mailable matter is obscene and enter an appropriate judgment.

(4) Upon the expiration of the time for filing answers and other defenses by the mailable matter and all respond-

ents the Court may, upon its own motion or upon the application of any party, set a date for the trial of the issues joined.

SECTION 9. PUBLIC POLICY, PROCEDURE. The public interest requires that all actions prescribed in this Act, other than criminal actions under Section 4 be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable to the trial of such actions.

SECTION 10. JUDGMENT. In the event the Courts finds the mailable matter to be obscene, it shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof:

(a) enter a permanent injunction against any respondent prohibiting him from doing or continuing to do any act condemned by this Act;

(b) direct any resident respondent to dispose of all such obscene mailable matter in his possession or under his control under such conditions and within such time as the court may find to be reasonable;

(c) if any respondent shall fail to comply with the Court's orders, direct all sheriffs in the State to seize and destroy all such obscene mailable matter in the possession or under the control of such respondent wherever the same may be found.

SECTION 11. INJUNCTIONS. Every order granting an injunction shall set forth the reasons for its issuance; shall

be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the respondents to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation by contract or arrangement with them who receive actual notice of the order by personal service or otherwise.

Copies of all orders of the Court in [*sic*] finding any matter to be obscene, and all orders of injunction issued in regard thereto, shall be served upon all persons; and in the same manner, as is provided in Section 7 of this Act.

SECTION 12. WHEN MAILABLE MATTER IS NOT EXEMPT. Any mailable matter which is sent or caused to be sent, brought or caused to be brought, into this State for sale or commercial distribution or which in this State is sold, exhibited or commercially distributed, given away or offered to be given away, by any person with knowledge of the judgment, or is in the possession of any such person with intent to sell or commercially distribute or exhibit or give away or offer to give away, is subject to the provisions of Section 4.

SECTION 13. CONTEMPT. Any respondent, or any officer, agent, servant, employee or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered pursuant to Section 11 and who shall disobey any of the provisions thereof, shall be guilty of contempt of court.

SECTION 14. EXTRADITION. In all cases in which a court has entered its judgment, pursuant to Section 10,

that the mailable matter in question is obscene, and a charge of continuing violation is hereafter brought against a person who, being a respondent to such judgment, cannot be found in this State, the Governor of this State shall, unless such person shall have appealed from such judgment and such appeal has not been finally determined, demand his extradition from the Executive Authority of the State in which such person may be found, pursuant to the laws of this State.

SECTION 15. The possession of any three (3) of the things enumerated in Section 4 of this Act (except the possession of them for the purpose of return to the person from whom received) shall create a presumption that they are intended for sale or commercial distribution, exhibition or gift, but such presumption shall be rebuttable. The burden of proof that their possession is for the purpose of return to the person from whom received shall be on the possessor.

SECTION 16. NON-RESIDENTS, JURISDICTION, PROCESS, CONSENT. In order to protect the morals and general welfare of the citizens and residents of this State against obscene printed or written matter or material originating outside this State, it is the purpose of this Section to subject to the jurisdiction of the courts of this State those persons who are responsible for the importation of such matter into this State and, by such act submits himself to the jurisdiction of the courts of this State in any action authorized by Section 5.

SECTION 17. All laws and parts of laws in conflict herewith are hereby repealed.

SECTION 18. If any provision of this act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

APPROVED: March 14, 1961.

Appendix B

INTRODUCTION TO CPDA PROPOSED STATUTE*

The Council for Periodical Distributors Associations (formerly known as the Council for Independent Distribution) is a voluntary non-profit association of wholesalers who supply newspapers, magazines and paper-backed books to the more than 142,000 retail outlets in the United States and Canada.

As citizens of the communities in which they work and live, the members of the Council since its organization on September 23, 1955 have become increasingly concerned with the spread of objectionable publications. Existing legislation, much of it of an early vintage, has in many instances been practically or constitutionally inadequate to cope with obscenity in publications, and has therefore often failed to supply the necessary corrective force to the problem.

On behalf of its membership, the Council is pleased to present for legislative consideration the attached anti-obscenity statute. Such proposed statute is the result of both the Council's original draft of May 2, 1960 and of valuable suggestions which have since been offered for its improvement by interested parties concerned with the problem of obscenity in literature. The Council feels, from the years of practical experience of its membership in the wholesaling of periodicals, that the following principles of the proposed statute are sound and if enacted will be effective. These principles are:

First, to provide public prosecutors with a speedy means to obtain a judicial determination of the contents of any

*Revised as of December 12, 1960.

publication. This is to be found in the provision for an immediate court review of questioned publications and, if probable cause is found to believe that any such matter is obscene, for the authorization of summons with the consequences attendant upon such issuance.

Second, to provide as immediate a protection as constitutionally possible of the morals and general welfare of the public. This is to be found in the section authorizing temporary restraining orders and preliminary injunctions.*

Third, to furnish public prosecutors with authority to reach non-residents responsible for the composition, publication and distribution of obscene publications. This is to be found in the sections dealing with extraterritorial service of process and consequent amendability to court orders, penalties for disobedience of court injunctions, responsibility for court fines, and extradition.

Fourth, to eliminate the situation under which resident wholesalers and dealers have most often unfairly been the crucible in which the obscenity of a challenged publication has been tested. To date, such challenge has customarily been by criminal arrest and trial with its attendant and often unjustified odium. Whether the outcome of such trial results in the acquittal of the wholesaler or dealer is dependent in large measure upon his ability correctly to predict at the start of his distribution through his uninformed judgment the legal propriety of the publication in question, a hazardous occupation for which he has no training or desire to exercise a unilaterial censorship.

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*The Arkansas Act does not permit injunctions *pendente lite*.

Appendix B

Recognizedly, many technical provisions of the proposed statute are subject to change in order to comply with the nomenclature, procedures and individual and often diverse requirements of the several States and Provinces. But practically, if the four principles of the measure are observed, the statute should be an effective step forward in the battle against obscenity.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

against

THE STATE OF ARKANSAS,

Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS AMICUS CURIAE

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IN THE

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Appellants,

against

THE STATE OF ARKANSAS,
Appellee.

BRIEF OF AMERICAN BOOK PUBLISHERS COUNCIL, INC. AS AMICUS CURIAE

Interest of American Book Publishers Council, Inc.

American Book Publishers Council, Inc., of 1 Park Avenue, New York City, is a membership corporation composed of most of the leading publishers of books of general circulation, including many university presses. It is estimated that the 188 members of the Council publish and distribute over 85% of all general books in the United States. None of the appellants is a member of the Council.

The Council is deeply interested in safeguarding freedom of the press as guaranteed by the First and Fourteenth Amendments to the Federal Constitution. It sought leave to and did obtain consent of the parties to file this brief, because it believes that Act 261 of the Acts of Arkansas 1961 is unconstitutional. The Council, as a matter of policy, takes no position with respect to the obscenity *vel non* of any publication and, therefore, this brief will not address itself to the character of the magazines herein involved.

ARGUMENT

POINT I

The statute is invalid in that on its face it is unconstitutionally vague and uncertain.

The statute attempts to regulate obscenity and contains a definition of the term "Obscene" as follows: "'Obscene' means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (§ 41-2715 (2)). That was this Court's definition in 1957 when it decided *Roth* v. *United States,* 354 U. S. 476, but as Mr. Justice Brennan stated in *Memoirs* v. *Massachusetts,* 383 U. S. 413, 16 L. ed 2d 1 (1966), at pp. 4-5, that definition was "elaborated in subsequent cases" so as to include three elements, of which the abovementioned "prurient interest" test is only one; the remaining ones being, of course, the "patent offensiveness" and the "redeeming social value" tests.

Had the statute merely prohibited the distribution and sale of "obscene" material without attempting to define that term, the courts would have been free to apply the

three required Federal constitutional criteria and the statute would not have been invalid for this reason. *Roth* v. *United States,* at p. 491. However, the statute becomes unconstitutionally vague when it attempts to define obscenity and includes only one criterion of the now three-fold Federal standard, but fails to include the other two requirements thereof. In *Memoirs* v. *Massachusetts, supra,* the opinion of Mr. Justice Brennan, joined in by the Chief Justice and Mr. Justice Fortas, stated:

> "A book can not be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive. Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness" (p. 6).

This position with regard to the required presence of patent offensiveness and total absence of redeeming social value of a work has been consistently advanced by various members of this Court since the *Roth* case, *supra.* We believe it is now the opinion of the majority of the present Court as expressed through opinions of the Court or in separate opinions.

Most recently, in the case of *Aday et al.* v. *United States of America* (October Term 1966, No. 149) another obscenity prosecution now pending before this Court, the Solicitor General of the United States filed a brief with this Court requesting a remand of the case because the Trial Court had refused to instruct the jury as to the necessity of total lack of any redeeming social value in

accordance with the decision of this Court in *Memoirs* v. *Massachusetts, supra.*

If the criteria applied by this Court may be whittled away statutorily by each state legislature, this Court's protection of constitutional rights could be readily destroyed. The next step might be for some other state legislature to enact an obscenity statute deleting the prurient interest test.

By reason of the failure of the Arkansas statute to set forth the requirements that a work must be patently offensive and utterly without redeeming social value in order to be adjudicated obscene, an ambiguity is created which cannot be cured. One is unable to determine whether the Arkansas legislature attempted to define "obscene" contrary to the requirements stated by this Court or whether the Federal criteria shall apply in direct contravention of the statute. We submit that such a statute is unconstitutional on its face.

POINT II

The Arkansas statute is unconstitutionally vague in describing the situs of the conduct proscribed.

Section 41-2714 states that it is the purpose and intent of the statute "to reach nonresidents responsible for the composition, publication and distribution of obscene publications within the State," but the succeeding sections appear to pertain only to acts committed within Arkansas. The acts of composition and publication of appellants' magazines, and indeed of most of the publishing community, invariably occur outside Arkansas and this is recognized in the statute by the above statement as to purpose and intent. The authority to control with criminal sanctions activities protected by the First

Amendment must be stated with appropriate definiteness and provide ascertainable standards of guilt. *Winters* v. *New York,* 333 U. S. 507 (1948); *Hallmark Productions, Inc.* v. *Carroll,* 384 Pa. 348 (1956). Because the statute herein fails definitely and clearly to distinguish between acts committed within and outside of Arkansas, it is unconstitutionally vague.

Moreover, the attempt to control composition and publication occurring outside Arkansas will operate to suppress magazines and other publications in states in which such magazines may be lawful. *People* v. *Richmond County News, Inc.,* 9 N. Y. 2d 578 (1961); *State* v. *Hudson County News Co.,* 41 N. J. 247 (1964). It also compounds the confusion created by the differing provisions of Section 41-2714 and the succeeding sections.

Furthermore, the very existence of this purpose and intent clause is a sharp warning to publishers in the other forty-nine states that unless they are willing and able to keep their books out of Arkansas they must publish all their books so as to meet the Arkansas test of obscenity, which ignores patent offensiveness and redeeming social value as criteria. The Arkansas purpose and intent clause is thus a menacing restriction to the dissemination of all literature, including constitutionally protected material, and should not be countenanced by this Court. *Smith* v. *California,* 361 U. S. 147 (1959); *Bantam Books, Inc.* v. *Sullivan,* 372 U. S. 58 (1963). The doctrine of *Butler* v. *Michigan,* 352 U. S. 380 (1957) would also be relevant to the validity of this clause because unless it is held invalid other legislatures will be encouraged to raise their own restrictions against constitutionally protected material. The result would be a legal climate in which only bland material satisfactory under all restrictions imposed by all states could be published.

Amicus also calls attention to the general lack of authority of the courts of Arkansas over this type of activity of nonresidents and urges this Court to avoid confusing restrictions on the free flow of ideas. Whatever right the State of Arkansas has to subject out-of-state persons to *civil* actions in the Arkansas courts based upon their sale of merchandise which eventually lands in Arkansas, it cannot impose *criminal* sanctions and confer upon itself *criminal* jurisdiction with respect to persons engaged in activities protected by the First Amendment where those persons have no direct relationship with Arkansas. In contrast to civil jurisdiction statutes, a criminal statute, enforced by extradition, would impose Arkansas standards on out-of-state persons in their activities which enjoy First Amendment protection.

CONCLUSION

For the reasons above stated we urge this Court to hold Act 261 of the Acts of Arkansas 1961 unconstitutional.

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SEP 28 1966

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO., INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC., and VOLITANT PUBLISHING CORP. ..... *Appellants*

v.

THE STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

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ON APPEAL FROM
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BRIEF FOR APPELLEE

OPINION BELOW

Both the majority (R.40-52) and dissenting (R.53-54) opinions of the Arkansas Supreme Court are reported at 239 Ark. 474, 393 S.W. 2d 219 (1966), and are recited verbatim in the printed record. A timely petition for rehearing was denied, but no opinion was published.

QUESTIONS PRESENTED

By order of this Court of May 16, 1966, noting probable jurisdiction, the questions presented for review are limited to the following issues.

1. Is Act 261 of the Acts of Arkansas 1961, which in essence seeks to govern the publication and distribution of obscene material to the public, invalid as impairing the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of the Acts of Arkansas of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, as vague and uncertain?

STATUTES INVOLVED

The statute in controversy is Act No. 261, Acts of Arkansas 1961, codified as Ark. Stat. Ann. §§41-2713 — 41-2728 (Repl. 1964). The act is recited in full at Appendix A of the Brief for Appellants.

STATEMENT

The introduction of appellants' brief is a fair, if rather limited, resume of the circumstances which culminated in this appeal.

This litigation originated in Jefferson County, Arkansas, at the instigation of the prosecuting attorney pursuant to the authority of Act 261. The statute, which will be discussed subsequently in detail, provides *inter alia* for both injunctive relief and criminal prosecution against the possession or distribution of obscene material. On February 4, 1964, suit was instituted on probable cause that certain magazines were obscene, praying that those publications be declared to be obscene, that the sale of the magazines be enjoined and that the magazines be seized and destroyed (R.1-3). In response to the application of the prosecuting attorney, the chancellor ordered the publishers, the appellants herein, and the local distributors to show cause on or before March 12 why the complaint should not be favorably entertained (R.3-4). Each of the defendants in the court below, except *Gent Magazine*, answered the complaint raising several Federal Constitutional issues, and requesting reasonable time to prepare for a hearing (R.4-5, 6-8). An amendment to complaint was thereafter filed on March 25 (R.8-10) and a response was submitted on April 6 (R.10). It was not until April 24, 1964, that *Gent Magazine* and Parlor Publications, Inc., tendered a response to the complaint (R.11-12).

Apparently, the matter was scheduled for hearing by agreement of the parties. The chancellor impaneled an advisory jury and after the conclusion of all of the evidence, both the jury and the judge concluded that the magazines were obscene within the meaning of the statute

(R.28). The decree was entered against appellants enjoining the selling, exhibiting or commercially distributing any of the identified magazines by name and issuance date and provided that they be destroyed. The chancellor retained jurisdiction of the parties for such further hearings deemed necessary.

An appeal to the Arkansas Supreme Court was made and *Gent* was permitted to become a party. Upon briefing and oral argument, a divided court affirmed the conclusion of the chancellor (R.40-52, 53-54). Timely application for a rehearing was made and denied (R.56-60).

Notices of appeal were filed setting forth ten separate issues to be presented on appeal (R.61-63). Probable jurisdiction was noted on May 16, 1966, by this Court, but review was restricted to questions pertaining to prior restraint on expression and vagueness (R.64).

It is submitted that appellants' brief on the merits has overreached and exceeded the bounds of the questions expressly recited for review.[1] In fact, it is the view of appellee that appellants have devoted a greater portion of their brief to matters concerning "national standards", postal regulations, and burden on interstate commerce which were precisely rejected by the order of the Court. Confronted with the alternative of ignoring the arguments, appellee has reluctantly offered abbreviated treatment of those issues and has followed the organizational topics of appellants' brief.

---

[1] Supreme Court Rule 40; California *v.* Taylor, 353 U.S. 553, footnote 2 beginning on 556 (1957).

PREFACE TO ARGUMENT

On 16 May, 1966, the Court entered an "order noting probable jurisdiction" limiting the appeal to the first two questions listed in the jurisdictional statement.

The two questions accepted by the Court charge that the Act under consideration (1) "operates as a forbidden prior restraint on expression" and (2) "is vague and uncertain". Nevertheless that part of appellants' brief labeled Point I is in fact primarily concerned with arguments that the statute interferes with the postal laws, invades the Federal Governments' jurisdiction over interstate commerce, is procedurally deficient, etc., arguments which obviously are not within the ambit of the questions noted for probable jurisdiction. In the portion labeled Point II the appellants primarily argue that a "national standard" for defining obscenity should be required; this question had been expressly rejected by the Court in its order. Although we are certain that the Court will ignore these irrelevant arguments, we feel constrained to reply to them in our brief on the chance that the Court might disagree with our interpretation. However, we are expressly requesting that the Court ignore the immaterial portions of appellants' brief and our reply to these portions.

SUMMARY OF ARGUMENT

I

Act 261 does not impose an unconstitutional restraint on the interstate dissemination of literature.

A

Act 261 does not impose a "prior restraint" invalidly.

The statute in controversy, Act 261, was enacted in 1961, less than four years after the decisions of *Roth* v. *United States*, 354 U.S. 476 and *Kingsley Books, Inc.*, v. *Brown*, 354 U.S. 436 (1957). The General Assembly of Arkansas adopted the definition of obscenity suggested by a majority of the Court and, with additional safeguards, duplicated the provision for injunctive relief approved in *Kingsley Books*. This procedure in equity was approved later in *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

B

Operation or Act 261 and its application to non-residents.

Act 261 does not operate to enjoin the publication of literature in any state except Arkansas. The suggestion of appellants that they should be governed by the law of the state where the magazines are published is untenable, because such a proposition would deprive each state of its inherent authority to legislate in this critical field and each of the other states would be governed by the law of the most liberal state in the union. While each state is free to adopt the most permissive type of act, it cannot adopt restrictions offensive to the Constitution.

Appellants cannot complain on appeal that the Arkansas trial court did not have personal jurisdiction of nonresidents since this matter was waived. *Michel* v. *Louisiana*, 350 U.S. 91 (1955); *Smith Chickeries* v. *Cummings, Judge*, 224 Ark. 743, 276 S.W. 2d 48 (1955).

C

The Arkansas statute against obscenity does not conflict with either the postal laws or the commerce clause.

For the first time, appellants interject that the Arkansas statute has been superseded by Federal occupation of the field of regulating obscenity in interstate commerce. This Court however, has consistently confirmed that prohibitions against obscenity are within the proper sphere of state police power. *Smith* v. *California*, 361 U.S. 147 (1959); *Times Film Corp.* v. *Chicago*, 355 U.S. 43 (1961). A review of the postal regulations and the decisions interpreting them, reveals no inconsistency with the state statute involved. *Alberts* v. *California*, 354 U.S. 476 1957; c.f. *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (1945). The mere fact that a state statute may affect matters of interstate commerce does not in itself require a nullification of the state statute. *Engineers* v. *Chicago R.I. & P.R. Co.*, 382 U.S. 423 (1966).

II

Act 261 is not unconstitutional because of vagueness

The Arkansas enactment provides reasonable, ascertainable standards. The definition of obscenity is identical to that approved in *Roth* v. *United States*, 354 U.S. 476 (1957). Both the state trial court and the Arkansas Supreme Court ruled that the community standards should

be that of Pine Bluff, Jefferson County, Arkansas, where the trial was held. Unless the contrary is demonstrated, it is presumed that the standards of a particular county are the same as those in any other county in any other state or the nation. *State* v. *Hudson County News Co.*, 188 A. 2d 444 (N.Y. 1963).

The definitions contained in the Act describing mailable matter and nonmailable matter are unambiguous and serve not only to separate application of either civil or criminal prosecutions, but places the requirement for *scienter* in a reasonable status.

III

The Arkansas statute was not applied as a future restraint.

It is readily conceded that any attempt to prohibit publication or sale of anticipated or scheduled issues of appellants' magazines is unconstitutional. *Near* v. *Minnesota*, 283 U.S. 697 (1961). The decree of the state trial court did not act as a prior restraint on future issues of appellants' magazines. If there was any genuine question concerning the application of the decree, it was clarified by the opinion of the Arkansas Supreme Court. *Gent* v. *State*, 239 Ark. 474 (R.52).

It was not contemplated that Act 261 or any decrees of courts rendered pursuant to that statute would operate in any manner outside the jurisdiction of the court or the territorial limits of the State. No effort has been made to affect publications of appellants in Connecticut or New York, nor has any attempt been made to limit distribution of any issue of magazines except those identified by the decree of the chancery court.

ARGUMENT

I

Act 261 does not impose an unconstitutional restraint on the dissemination of literature.

A

Act 261 does not impose a "prior restraint".

We understand the term "prior restraint" to mean a restraint placed on the publication or distribution of printed matter which occurs before a judicial determination on whether or not the material violates some statutory scheme of regulation. The Arkansas statute in question does not permit any censorship or restraint before a judicial hearing to determine if the material would be obscene by the standards stated in the statute. Further, the injunction order is specifically limited in its application to named issues of the magazines and does not in any way affect the publication or distribution of future issues. Consequently, the statute in its application does not involve "prior restraint" unless one interprets that term to include all injunctive procedures against printed matter, whether the restraint occurs before or after a judicial determination of the obscenity issue. Such an interpretation would constitute a departure from previous rulings of this Court. See *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Kingsley Books* v. *Brown*, 354 U.S. 436 (1957); and *Freedman* v. *Maryland*, 380 U.S. 51 (1964).

As recently as 1957, this Court upheld the constitutionality of a New York statute which authorized injunctive relief against obscene literature. *Kingsley Books* v. *Brown*, *supra*. In that case, the distributor was en-

joined *pendente lite* from dissemination of certain paperback booklets. Although the temporary injunction constituted a prior restraint on the distribution of the booklets, nevertheless, this Court affirmed the New York Court of Appeals and rejected the claim that the statute was violative of the due process clause of the Fourteenth Amendment, stating:

> . . . The phrase "prior restraint" is not a self-wielding sword. Nor can it serve as a talismanic test. The duty of closer analysis and critical judgment in applying the thought behind the phrase has thus been authoritatively put by one who brings weighty learning to his support of constitutionally protected liberties: "What is needed," writes Professor Paul Freund, "is a pragmatic assessment of its operation in the particular circumstances. The generalization that prior restraint is particularly obnoxious in civil liberties cases must yield to more particularistic analysis." The Supreme Court and Civil Liberties, 4 V and L Rev. 533, 539 . . . [1 L ed 2d, p. 1474].

The New York procedure, unlike that permitted by the Arkansas statute, allows the entry of an injunction before adjudication of the obscenity question. Therefore, the Arkansas Act meets at least some of the objections raised by the dissenters to *Kingsley Books* decision. In *Freedman* v. *Maryland, supra,* the Court suggested that the New York procedure be adopted by Maryland:

> How or whether Maryland is to incorporate the required procedural safeguards in the statutory scheme is, of course, for the State to decide. But a model is not lacking: In *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L ed 2d 1469, 77 S Ct 1325, we upheld a New York injunctive procedure designed to prevent the sale of obscene

> books. That procedure postpones any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. . . . [13 L ed 2d, p. 655].

If the New York procedure is valid, then the Arkansas procedure, which does not permit any prior limitation on publication, is also valid. This Court upheld the New York procedure in *Kingsley Books* and reiterated its approval in *Freedman*. Therefore, the Arkansas statute does not impose an unconstitutional prior restraint on the publication of literature.

B

Operation of Act 261 and its application to nonresidents.

Next appellants manufacture a legal fiction that Act 261 acts to enjoin the publication of literature in the State of New York and thereby operates as a prior restraint. A reading of the State proceedings, however, fails to substantiate this conclusion. If there is any doubt, appellee here concedes that the trial court may effectively operate within its jurisdictional limits and any attempt to exceed those bounds amounts to but a nullity.

In this same context, appellants raise, for the first time, the manner in which jurisdiction was secured as to the nonresident appellants. No objection was even intimated by their pleadings before the trial court and no mention was made on appeal before the Arkansas Supreme Court. Moreover, by responding to the complaint, appellants consented to the Jefferson Chancery Court's hearing the matter and, by so doing, effectively waived any subsequent complaint based on jurisdiction. *Smith Chickeries* v. *Cummings, Judge,* 224 Ark. 743, 276 S.W.

2d 48 (1955); *Strahan* v. *The Atlanta National Bank*, 206 Ark. 522, 176 S.W. 2d 237 (1943). In this composure it is too late for appellants to interject this issue, for this Court has firmly adhered to the practice of not entertaining matters not properly presented to the court below. *Michel* v. *Louisiana*, 350 U.S. 91 (1955).

C

The Arkansas statute against obscenity does not conflict with either the Postal Laws or the Commerce Clause.

By reference to postal statutes and interstate commerce regulations, appellants interject, for the first time, that the Arkansas statute has been superseded by virtue of federal occupation of the field of regulating obscenity and interstate commerce. It is submitted, however, that a supposed conflict of federal and state statutes rests upon an erroneous interpretation of the operation of the Arkansas statute as well as a misconception of the operation of federal regulations and laws.

The suggestion of federal pre-emption of state obscenity statutes is not of first impression. On the contrary, this Court has consistently confirmed that prohibitions against obscenity are within the proper sphere of state police power. *Smith* v. *California*, 361 U.S. 147 (1959).

This authority is qualified, of course, by a criterion of reasonableness and must not run afoul of or conflict with constitutional provisions and prohibitions. *Butler* v. *Michigan*, 352 U.S. 380 (1957). The extent of this power or an attempt to define its outer limits is fruitless, for each case must be determined on its own facts. *State ex rel. Beil* v. *Mohoning Valley Distributing Agency, Inc.*,

84 Ohio L. Abs. 427, 109 N.S. 2d 48, aff'd 116 Ohio App. 57, 186 N.E. 2d 631 (1960); *People* v. *Kahan*, 15 N.Y. 2d 311, 258 N.Y.S. 2d 391 (1965).

Both the state and federal judiciary have adhered to the principle that where a statute is susceptible to two interpretations, one valid and the other invalid, that of validity will be adopted. Where there are two apparently conflicting statutes, every effort will be made to construe them in *pari materia*. *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440 (1960).

It is agreed that the Congress of the United States has discretion to exercise complete authority over a subject in interstate commerce. It should be granted by appellants that both federal and state statutes may operate and govern the same issues so long as the presence of the latter does not frustrate the operation of the former. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963). In absence of a clear manifestation of legislative purpose, it is recognized that the federal enactment must be so comprehensive as to be imcompatible with the local law before the Supremacy Clause will be invoked to supersede the conflicting state statute. *Local 20* v. *Morton*, 377 U.S. 252 (1964).

The only federal regulation recited by appellants is 18 U.S.C. §1461. A review of that statute, and the decisions interpreting it, reveals no inconsistency with the state statutes involved. Cf. *Railway Mail Association* v. *Corsi*, 326 U.S. 88 at 96 (1945); U.S. Const. Act I. §8, d. 7; *Alberts* v. *California*, 354 U.S. 476 (1957).

The mere fact that a state statute may operate and even affect to some degree matter involving interstate commerce, does not in itself require nullification of the

state statutes. *Engineers* v. *Chicago R. I. & P. R. Co.*, 382 U.S. 423 (1966).

The present case and the record confirms that the Arkansas statute, like many others enacted by the several other states, does not impose any undue restrictions on interstate commerce and does not conflict with the powers and duties of Congress in regard to the establishment of postal regulations.

II

Act 261 is not unconstitutional because of vagueness.

The second principal topic of appellants' brief suggests that the statute in controversy is not sufficiently definitive to satisfy the constitutional demand of certainty to apprise the public of exactly what is prohibited. The complaint apparently stems from three separate contentions. Each is discussed in the order of appearance in appellants' brief.

First, appellants criticize the statutory definition of obscene as being inadequate and not comporting with the pronouncements of this Court. This is quite remarkable inasmuch as the General Assembly adopted almost verbatim the expression approved in *Roth* v. *United States*, 354 U.S. 476, 489 (1957).

A casual perusal of the statute reveals no ambiguity. The material as a whole is obscene simply if, by applying contemporary community standards, it appeals to prurient interests. Ark. Stat. Ann. §41-2715 (2) (Repl. 1964). Most recently, a challenge of the definition of obscenity

as being impermissibly vague was rejected in *Mishkin* v. *New York*, 383 U.S. 502, 507 (1966).

The majority opinion in *Roth* recognized the problem of preciseness, stating at 354 U.S. 476:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of duce process. . . . [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . *United States* v. *Petrillo*, . . . These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . . That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. . . .
>
> "In summary, then, we hold that these statutes, applied according to the proper standard for judging obscenity, do not offend constitutional safeguards against convictions based upon protected material, or fail to give men in acting adequate notice of what is prohibited. . . ."

The second proposition promoted by appellants is primarily an attack of the use of community standards. Concisely put, appellants say that the use of community standards as in the case of Pine Bluff " . . . is an impermissable restraint on the [freedom of the] press."

It is asserted that the Supreme Court of Arkansas, by not applying a national standard, violated the ruling in *Jacobellis* v. *Ohio*, 378 U.S. 184 (1964). However, although the national standard question was squarely presented in the case, it was not accepted by a majority of this Court.

The confusion expressed by appellants as to what is meant by community standards is totally lacking in substance. The Supreme Court of Arkansas experienced no difficulty in resolving that the standards of the community of Pine Bluff should be applied,[2] it concluded:

> " . . . We think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary standards in Pine Bluff, Arkansas."

In the case at bar, the venue was Jefferson County and the court was held in Pine Bluff. Jefferson County is the third largest populated county in Arkansas and Pine Bluff ranks third as an urban area in the State. Although it is possible it is not probable that the views of witnesses and the conclusion of a jury in Pine Bluff would vary alterably from any other area of Arkansas or the Nation.

At least one case has held that it could indulge in a presumption that the community standards of a particular county were the same as those in any other county in the state or Nation unless the contrary was demonstrated.

---

[2]In Arkansas, a chancellor may impanel a jury in an advisory capacity of factual issues. Ringold *v.* Patterson, 15 Ark. 209 (1854). Ordinarily, findings by a jury are conclusive if supported by substantial evidence, but matters of equity are heard de novo on appeal. A and B *v.* C and D, 239 Ark. 406, 390 S.W. 2d 116 (1965) cert. den. 382 U.S. 926.

State v. *Hudson County News Co.*, 188 A. 2d 444 (N.Y. 1963).

The concluding argument in this topic is directed at the definition of "mailable matter."[3] By the introduction of the statute, it is clear that reference is restricted to material that could be properly and physically deposited for mail delivery. This material is reduced to two categories: (a) That which has not been disapproved by a appropriate postal authorities; and, (b) That material which has not been determined to be either proper or improper as mailable.

[3]Appellants' brief, 15; Ark. Stat. Ann. Sec. 41-2715 (1) (Repl. 1965)

In deference to all, the statute seems insusceptible to interpretation. It matters not how the material is transported or delivered. The obvious purpose of the "mailable" provision is that such material is placed in a protected plateau and exempts criminal prosecution until judicial resolution to the contrary. In this manner, criminal intent is placed in a reasonable status.

III

The Arkansas statute was not applied as a future restraint.

The concluding argument of appellants' brief challenges the decree of the trial court as constituting a prior restraint or future issues of appellants' magazines. It may be gleaned from the devotion of less than two pages on this point that appellants recognize the lack of substance to this anemic argument.

Initially, it is submitted that the decree did not literally forbid or enjoin the distribution or sale of future

issues of magazine. In fact the decree specifically identified each issue of the magazine by date (R.28-30).

It is readily conceded that any attempt to prohibit publications or sale of anticipated or scheduled issues is unconstitutional. *Near* v. *Minnesota,* 283 U.S. 697 (1931). This identical question was presented to the Arkansas Supreme Court and decided in favor of appellants, holding:

> "Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazine will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered [fol.332]. Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree" (R.52).

If this Court is governed by the interpretation of state laws by state courts, then similarly the same confidence should be given the rulings and interpretations of the Arkansas Supreme Court of the judgments of lower state courts. Thus, the Arkansas Supreme Court has acted to clarify any inconsistency or defect of the chancellor's order.

At a final remark, appellants urge that the Jefferson Chancery Court has ordered all copies of appellants magazine to be destroyed. It is insinuated that the order is to apply universally and failure of appellants to comply will result in impending extradition or a finding of contempt. The fear exuded by appellants is totally unfounded.

Frankly, what is published or read in New York or Connecticut, except for maintainance of national morals, is of little concern to the citizens of Pine Bluff. Those states are sovereign bodies with capable, dedicated officials who presumably will fulfill and have discharged, the obligation of their capacities. It may be confidently stated that if a publisher residing in Pine Bluff delivered obscene material to either of those states, appropriate action could and should be taken to prevent that material from reaching the public in those states.

CONCLUSION

This case is extremely important not only to the State of Arkansas but to each of the other states as well. Many of the constitutional guaranties remain delicately balanced by equally valued and traditionally honored operation of state police power.

The police power is a valuable and sacred trust fixed in the people. It sprang with the development of civilization and has nurtured an orderly society. It should remain intact.

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OCTOBER TERM, 1966

No. 50

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLICATIONS CORP., SKYE PUBLISHING CO., INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLISHING, INC. and VOLITANT PUBLISHING CORP.,

Appellants,

—against—

THE STATE OF ARKANSAS,

Appellee.

REPLY BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

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REPLY BRIEF OF APPELLANTS

Restraint on the Press

The appellants have argued that the statute on its face is a restraint on the press in that it seeks to control the movement of literature across state boundaries and thus to reach those non-residents responsible for the composition and publication of the literature (Brief, pp. 6-13). The appellee counters by stating that it is a restraint that this court approved in *Kingsley Books, Inc.* v. *Brown.* Aside from appellants' doubts as to the validity of the statute in *Kingsley* (a doubt shared with them by four justices of this court), it is plain that this statute bears little similar-

ity to the New York statute. New York sought to restrain the local purveyor of the publication. The intent of the Arkansas statute is mainly directed toward non-resident authors and publishers. That is the chief thrust of appellants' argument.

Nor does appellee answer appellants' objection to the restraint upon non-resident authors and publishers, by arguing that each state has inherent authority to legislate with respect to distribution of publications. The state may have power to legislate with respect to publications within the state. But this still leaves unanswered whether a state may control and penalize authors and publishers in another state who transmit books into Arkansas, and subject non-resident authors and publishers to extradition to Arkansas to stand trial for a felony because the books they write or publish do not meet the standards of a village or county in Arkansas. Appellee fails in his reliance on *Alberts* for support, for that case dealt with a local question, "keeping for sale" and "advertising" within the State (p. 493).

And any attempt by appellee's counsel (page 11 "B", Brief for Appellee) to concede away the scope of the statute is without effect, for not only does he not have authority to repeal a legislative enactment, but his concession does not touch upon the basic structure of the statute which has resulted in a judgment against these appellants. The statute has operated against these non-resident appellants and the judgment appealed from is the manifestation of the operation of the statute.

In complaining against the attempt of Arkansas to invade the federal postal and interstate spheres, appellants do not

depart from the questions raised by them in the Statement as to Jurisdiction (as appellee suggests) for clearly that argument was made (Statement as to Jurisdiction, pp. 15-17). In making the argument as to the restraints on the press with respect to transmission of literature by non-residents into Arkansas, it is inevitable that reference to the use of the mails and interstate commerce would present itself. In pointing to the postal powers and interstate commerce, appellants have included subsidiary questions that are fairly comprised within the scope of the broad question of the restraint on publications (Rule 40(d)). Any restriction on the freedom of publication necessarily invites reference to the manner in which the restriction is manifested. In this case the statute specifically refers to the use of the mail and other means of delivery. Therefore, the appellee is not correct in complaining that appellants have extended their questions presented.

Moreover, the appellants do not limit their observations of restraint to the invasion of the postal and interstate commerce powers. They point to the interference with the publisher and author by seeking to punish them for having transmitted from their home state, literature which a county in the receiving state finds offensive. And appellants have shown that since this court has already held that a state could not interfere with the importation of liquor, it follows all the more, that it cannot restrain the shipment of literature, since books and magazines rank higher in the constitutional scale of values.

Appellee suggests (p. 11, last paragraph) that appellants object to the method by which jurisdiction was obtained over them. On the contrary, appellants expressly disavowed

an attack on that procedural deficiency (Brief, 12). Appellants pointed out that the procedure for obtaining jurisdiction over authors and publishers who have no contacts with Arkansas merely emphasizes the bundle of defects that permeate this statute's eagerness to restrain non-resident authors and publishers.

Vagueness

The appellants do not argue in this court the vagueness of the definition of "obscenity". Their attack as to vagueness is that of "community standards" as appears on the face of the statute and as applied by the court. This question was tendered in appellants' answer (R. 7, paragraph (c)). That issue was renewed in the questions presented in this court. The appellee therefore is incorrect in asserting that the issue was not accepted by this court for review.

Appellee does not adequately answer the contentions that the definitions of non mailable matter are clear. The statute speaks of obscene mailable matter,—a contradiction in itself. 18 U.S.C. 1461. Non mailable matter could be mail that was not sent second class, nor was it ever submitted for a determination to the Post Office or it could mean matter shipped by means other than the post office.

The Brief of Council for Periodical Distributors Associations

Although CPDA argues that the judgment below was wrong, because the court did not use a national standard in determining obscenity, it nevertheless urges that the statute, its offspring, is valid. Diametrically opposed to

CPDA is a brief expected to be filed by the American Book Publishers Council, Inc., as *amicus curiae* an organization whose credentials are high, as is its experience. That organization not only argues that the statute is repugnant to the Constitution for the same reasons as appellants, but goes further, and argues that the statute is defective in that the definition of "obscenity" lacks the necessary element of being utterly devoid of social importance.

The protestation of CPDA that it seeks to prevent the dissemination of "objectionable publications" is general, for it can be assumed that the American Book Publishers Council or any civil libertarian is interested in the spread of literature of high quality. What appears at stake here to CPDA drafters of the statute however is a sincere attempt at vindication of their draftsmanship. And they frankly announce that they are the progenitors of the statute (p. 4). Mothers are notoriously known for translating the vices of their children into virtues. Their zeal therefore should be treated with reserve.

What the curious spectacle of CPDA reveals, is that there are some people who are willing to trade their birthright for an illusion of security. It is professed by that brief that for the sake of obtaining security for local dealers in the form of an official imprimatur, it is desirable that publishers and authors should be subjected to the rigors and insecurity of this statute. If security be all that is sought, then a reversion to the licensing laws of 300 years ago would afford a fuller measure of that security. And if one wishes illumination on the wisdom of accepting censorship in trade for security, reference is made to the New York case of *Hughes Tool Company* v. *Fielding*, 297 N.Y. 1024, affirming 272 A.D. 1048, affirming 188 Misc. 947, where

after the exhibitor of a motion picture had succeeded in obtaining a license from the state motion picture licensing board, was nevertheless threatened with criminal prosecution by the New York City police for obscenity.

The "*in rem*" proceeding provided by the statute is to provide a judicial imprimatur for a publication or its condemnation. Had this procedure been in effect years ago, it could have resulted in the permanent ban of books which time has disclosed to have been erroneous. With the Arkansas statute one county in the state may bar a publication and another may approve. Moreover, there is no time limit as to the force of a judgment, so that it does not insure against the mistake of a "foolish judgment" against another *Queen Mab*.

If security is the underlying thesis of CPDA's statute, then the security of the non-resident publisher and author should also be considered.

Since security for the local dealer is the concern of the statute, as *amicus* urges, then the law should confine itself to its local characteristics. The New York statute, 22-A, has such local characteristic; it does not seek to involve non-residents.

This Arkansas statute however does not content itself with reaching local vendors. And therefore CPDA is wholly inaccurate in attempting to assimilate this statute with that approved in *Kingsley Books* v. *Brown*. It bears repetition, that the New York statute does not attempt to reach out of state publishers and authors.

The issues have been disposed of in the briefs filed by the parties and in this one. But there are some errors and misconceptions in *amicus'* brief that should be treated:

The Proceedings Below (CPDA 8)

It is stated that the action was not commenced against appellants and no relief was sought against them. The complaint and the order to show cause (R. 3-4) specifically mention these appellants and direct that they show cause why the relief should not be granted and direct that notice of the application should be served on them by mail. Accordingly, they responded (R. 6).

Criminal Prosecution and Extradition (CPDA 7)

It is argued that there cannot be criminal proceedings with its concomitant of extradition except for a violation of the decree, enjoining distribution. But that is only in the case of "mailable matter". But when other means of transportation are used, or the literature has not received approval of the Post Office Department, criminal prosecution for a felony may follow (Section 2716).

Moreover, even in the case of "mailable matter" prosecution, or contempt proceedings and extradition against a non-resident who has no contacts with Arkansas, may follow, if the decree is violated (Sect. 2725-2726).

It should again be repeated that appellants do not urge that the statute is repugnant to the Constitution because it provides for service of process by mail against non-residents who have had no contacts with Arkansas. That procedural defect is out of this case by reason of the appellants' appearance and failure to object to the service of process. What appellants object to is of greater import than the means of service of process. Appellants object to the dominion a state assumes over non-residents' publica-

tions and the transmission of those publications over state lines. This, we submit, is the gist of appellants' grievance.

The Book is Tried as well as the Publisher (CPDA 14)

It is urged by *amicus* that only the person is tried, not the publication. This is not borne out by a reading of the statute, the complaint or the judgment. In each one a declaration is sought of the obscenity of the book and of its suppression (Sect. 2718(d)(e)(f); R. 2, "Wherefore" clause; R. 29). The statute is double-barreled: it acts against the book as well as the non-resident person.

Postal and Interstate Shipment (CPDA pp. 21-26)

It is assumed throughout by *amicus* that in the absence of interference with postal or interstate regulations, a state may legislate in those areas. The premise is incorrect for it is a principle of constitutional construction that where Congress has indicated uniformity to be desirable, a state may not intrude. The cases supporting this principle are cited in the appellants' brief.

If interference must be shown, it is provided by the Arkansas statute, for it seeks to control "mailable matter", so that if the Post Office Department in New York approves a mailing, nevertheless such "mailable matter" falls subject to control by Arkansas law if a county jury should find the matter "obscene". (Sections 2717, subd. (2), referring to "obscene mailable matter" 2722, 2724, 2726).

The reliance by *amicus* on *Alberts* as holding that a state may do as Arkansas seeks to do, is misplaced. The only

provisions involved in *Alberts* were purely local, "keeping for sale" and "advertising" within the state (p. 493).

There are other misconceptions and contradictions in the *amicus* brief (e.g. that only the terms of an order are in issue, p. 10) that it would be digressive from the main contention of appellants, to pursue each one. The court will recognize them readily.

Conclusion

We respectfully refer to Brief of Appellants, where we submit, appellants have cogently and fully argued that this statute is repugnant to the Constitution of the United States.

Respectfully submitted,

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